Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-1331

KEVIN SCOTT, 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*: Kevin Scott, appeals through counsel that part of a December 19, 2018, Board of Veterans' Appeals decision that denied service connection for bilateral hearing loss and tinnitus.[1] Record (R.) at 5-15. The appellant argues that the Board (1) erred by failing to ensure that the duty to assist was satisfied by relying on an inadequate VA addendum opinion; (2) failed to provide an adequate statement of reasons or bases to support its reliance on this opinion; and (3) failed to provide an adequate statement of reasons or bases by failing to address favorable evidence of nexus, failing to address arguments that the service treatment records are incomplete, and failing to adequately address lay reports of continued symptoms of hearing loss and tinnitus. Appellant's Brief at 7-24. For the following reason, the Court will set aside that part of the December 2018 Board decision on appeal and remand the matters for further development and readjudication.

I.

[1] The Board also remanded a claim for stuttering. This matter is not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997).

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

---

[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 1968 to July 1970 as a firefighter and hero missile crewman. R. at 98 (DD Form 214), 415 (DD Form 214). In June 1969, the appellant was twice treated for ear pain as a result of both ears being packed with cerumen. R. at 270-71. Upon the appellant's entrance into service, his hearing results were the following:

HERTZ					
	500	1000	2000	3000	4000
RIGHT	5	-5	-5	-	5
LEFT	15	-5	-5	-	-5

R. at 308-09. His separation audiological results were the following:

HERTZ					
	500	1000	2000	3000	4000
RIGHT	10	5	10	10	10
LEFT	25	10	10	10	10

R. at 387-88.

IV.

The appellant filed service-connection claims for bilateral hearing loss and tinnitus in November 2010. R. at 404-09. In January 2011, he underwent a VA examination for these conditions. R. at 353-55. This examination revealed some signs of hearing loss, which neither party disputes. *Id*. However, the appellant's STRs were unavailable at the time for the examiner to review. R. at 355. The appellant then underwent another examination in which the examiner had access to the veteran's STRs, and the examiner provided an addendum opinion taking into account these STRs. R. at 347-48. The examiner stated that "[g]iven the veteran did not report hearing loss or tinnitus at the time of his medical concerns with his ears, it is less likely than not the veteran's hearing loss and tinnitus were caused by or a result of military noise exposure," and "[g]iven the

veteran had normal hearing for ratings purposes on his separation audiogram, it is less likely than not the veteran's hearing loss was caused by or a result of military noise exposure." *Id*.

V.

In December 2018, the Board denied service connection for hearing loss and tinnitus. R. at 5. The Board conceded that the appellant had in-service noise exposure and diagnoses of bilateral hearing loss and tinnitus. R. at 8, 10. The Board, however, relied on the August 2011 addendum opinion to find no nexus between the appellant's current hearing disabilities and service. R. at 9-12. 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).

VII.

The Court concludes that the Board erred by failing to return the August 2011 VA addendum opinion for clarification. *See* 38 C.F.R. § 4.2 (2019) (VA is required to "return the

[examination] report as inadequate for evaluation purposes" if the report "does not contain sufficient detail".). The examiner's negative rationales were in part based on the fact that the appellant did not report hearing loss or tinnitus when he sought treatment for cerumen in his ear. R. at 347-48. Yet, it is unclear why the appellant would have complained of hearing troubles when he sought treatment for ear pain, as the examination was not a general ear examination but was administered specifically to treat the appellant's discomfort. *See* R. at 270-71. The examiner's other stated reason for a negative nexus opinion for bilateral hearing loss was that the appellant's hearing upon separation did not meet the definition of a disability. Yet, the examiner failed to address the fact that the appellant's separation examination revealed threshold shifts at every frequency. Given that the appellant did not have to establish that his hearing loss existed at the time of separation to be entitled to service connection, *see Hensley v. Brown*, 5 Vet. App. 155 (1993). It is also unclear why the threshold shifts were not sufficient to warrant a favorable opinion. Remand of both claims is warranted for the Board to seek clarification of the August 2011 VA addendum opinion. *See* 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). 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, that part of the December 19, 2018, Board decision on appeal is SET ASIDE and the matters are REMANDED for further development and readjudication.

DATED: 4/30/2020

Copies to:

Glenn R. Bergmann, Esq.

VA General Counsel (027)