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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-0287

PATRICK RODRIGUEZ, 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 Patrick Rodriguez appeals, through counsel, a December 17, 2018, Board of Veterans' Appeals decision that denied him service connection for a right shoulder disability, a disability rating in excess of 30% for headaches, and a disability rating in excess of 30% for post-traumatic stress disorder (PTSD).¹ Record (R.) at 5-18. The appellant argues that the Board (1) failed to consider the appellant's theory of secondary service connection for his right shoulder disability; and (2) provide an adequate statement of reasons or bases in denying a disability rating in excess of 30% for his headaches and PTSD. Appellant's Brief at 10-21. For the following reasons, the Court will set aside the December 2018 Board 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'

¹ In May 2018, the appellant opted to have his appeal heard in the Rapid Appeals Modernization Program (RAMP) via higher-level review. R. at 271.

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 Act of Mar. 23, 1792, ch. 11, 1 U.S. Stat 243 (1792) (repealed in part and amended by Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (1793)).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 Jay² wrote a letter³ to President George Washington on behalf of the Circuit Court for the District of New York⁴ 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

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).

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"); *see 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 Alito⁵ 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 judge⁶ 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.

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).

The appellant served on active duty in the U.S. Air Force from August 2002 to August 2008 as a security forces journeyman, including six deployments to Iraq. R. at 1210 (DD Form 214). He earned many accolades for his meritorious service, including the Air Force Outstanding Unit Award with Valor Device with 2 oak leaf clusters. *Id.*

IV.

In May 2017, the appellant filed a notice of an intent to apply for disability benefits. R. at 1227. That same month, the appellant sought VA treatment for "posterior neck pain with radiculopathy to bilat[eral] shoulder," and "right posterior shoulder pain." R. at 99-100. The appellant reported an "electric shock sensation in [his] right shoulder blade . . . [with] chronic posterior neck pain." R. at 101.

In August 2017, the appellant sought followup treatment for "continued posterior neck pain and right shoulder pain . . . [that had been] chronic since 2008." R. at 176-77. The appellant "denied any specific injuries but notes he has 6 deployments and some IED blasts." R. at 177. The appellant also reported a constant pain in his shoulder, that increased in severity with high impact activities. *Id.*

In September 2017, the appellant submitted his application for disability benefits. R. at 1211-14. In October 2017, the appellant attended a VA PTSD examination. R. at 824-33. The examiner noted that the appellant was currently employed only part time because of "his depression and lack of energy/motivation." R. at 827. The examiner diagnosed the appellant with PTSD with symptoms of depressed mood, anxiety, and frequent panic attacks. R. at 831. The examiner noted that the appellant's depression and other mental disability symptoms "overlap[ped]" and that "[t]hey exacerbate each other." R. at 825. The examiner noted that the appellant had "passive thoughts of death but no serious [suicidal intent] or plan." R. at 831.

That same month, the appellant underwent a VA headaches examination. R. at 457-59. The appellant reported suffering from 3 to 4 "intense" headaches a day that began "4 years ago," with "throbbing . . . usually around [the] right eye." R. at 457. The appellant used BC powder to alleviate the pain and suffered from sensitivity to sunlight. *Id.* The examiner noted that the appellant's "concentration and focus are affected at work." *Id.* The examiner found that the appellant suffered from prostrating headaches once a month, and did not have "very prostrating or prolonged attacked . . . productive of severe economic inadaptability." R. at 458. The examiner also concluded that

the appellant's headache disability affected the appellant's ability to work by "limit[ing] concentration and productivity when they occur." *Id.*

In January 2018, the appellant underwent a VA chronic fatigue examination. R. at 340-43. The examiner noted the appellant's "cold relationship" with customers and that the appellant lost his last job because of his inability to interact normally with others. R. at 340. The appellant reported interpersonal problems, an inability to keep jobs, "strong headache[s] [that] lasted two days," and typically experiencing "three attacks of headaches a day. Each headache lasts 20-40 minutes. It starts with right side of head throbbing." R. at 341.

In May 2018, the appellant underwent a private vocational assessment. R. at 274-86. The private consultant reviewed and addressed the appellant's disability benefits questionnaires, interpersonal issues, and employment history, and ultimately found that the appellant was unemployable. *See id.*

In November 2018, the appellant argued to the Board that his right shoulder disability claim was secondary to his neck claim, which had been remanded, and therefore inextricably intertwined.⁷ R. at 29.

V.

In December 2018, the Board denied the appellant service connection for a right shoulder disability, a disability rating in excess of 30% for service-connected headaches, and a disability rating in excess of 30% for PTSD, also claimed as anxiety and depression. R. at 5-18. The Board found that although the appellant suffered from a current right shoulder disability, he was not entitled to service connection because there was "no allegation of any incident or injury in service," and therefore no connection between the appellant's current disability and his active duty service. R. at 8.

The Board also stated that the appellant provided no specific allegations to support his contention that he was entitled to a higher disability rating for headaches. R. at 10. The Board adopted the October 2017 VA examiner's conclusion that despite the appellant's suffering from three to four headaches per day, characterized by "intense. . . pulsating or throbbing pain" and

⁷ The Court notes that the appellant's neck disability claim was not before the Board in its December 2018 decision. R. at 6.

sensitivity to light, these headaches were prostrating only about once a month and "not productive of severe economic inadaptability." R. at 12.

Regarding the appellant's PTSD claim, the Board found that the appellant was not entitled to an increased disability rating, in part, because he was "employed throughout the time on appeal." R. at 16. This appeal ensued.

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 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 will remand the appellant's right shoulder disability claim as inextricably intertwined with the appellant's remanded claim for service connection for his neck disability. *See Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991) (holding that where a decision on one issue may have a "significant impact" upon another, the two claims are inextricably intertwined), *overruled on other grounds by Tyrues v. Shinseki*, 23 Vet.App. 166 (2009) (en banc), *aff'd*, 631 F.3d 1380, 1383 (Fed. Cir. 2011), *vacated and remanded for reconsideration*, 132 S. Ct. 75 (2011), *modified*, 26 Vet.App. 31 (2012). In May 2017, the appellant sought treatment for "neck pain with bilateral shoulder radiculopathy." R. at 99. In August 2017, the appellant sought treatment for neck and shoulder pain that had been "chronic since 2008," the year the appellant was separated from active duty service. R. at 177, 1210. At the time of the Board decision, the appellant's claim for service connection for a neck disability was not before the Board, yet the Board failed to explain whether the appellant's right shoulder disability should have been remanded along with the neck claim as inextricably intertwined. R. at 6. The appellant seemed to have simultaneously complained of his shoulder and neck pain throughout the period on appeal. *See* R. at 99-100, 176-77. Remand is required because the adjudication of the neck disability may have a "significant impact" on whether the right shoulder disability is secondarily service connected. *See Harris*, 1 Vet.App. at 183.

The Court also concludes that the Board failed to provide an adequate statement of reasons or bases for finding that the appellant was not entitled to a disability rating in excess of 30% for his headaches. *See* 38 U.S.C. § 7104(d)(1); *see also* *Pierce v. Principi*, 18 Vet.App. 440, 446 (holding that the statement of reasons or bases must evaluate the impact of the veteran's headaches in terms of whether they could produce severe economic inadaptability, not whether they actually produce it.). In the October 2017 VA headache examination, the appellant reported having had 3 to 4 intense, throbbing headaches a day for 4 years, along with sensitivity to light, with each headache lasting up to an hour. R. at 457. The examiner noted that the appellant's "concentration and focus are affected at work." *Id.* The Board found that though the appellant suffered from 3 to 4 hours of headache pain a day, because there was no "evidence or allegation suggesting that his headaches *cause* severe economic inadaptability," the appellant was not entitled to a higher disability rating. R. at 12 (emphasis added). Yet, the proper analysis is not whether the headaches caused severe economic inadaptability, but whether these headaches *could* cause economic inadaptability. *See Pierce*, 18 Vet.App. at 446. Remand is required for the Board to provide an adequate statement of reasons or bases for its degree of disability determination regarding the appellant's headaches. *See* 38 U.S.C. § 7104(d)(1).

The Court finally concludes that the Board failed to address favorable evidence when it determined that the appellant was not entitled to a higher disability rating for PTSD. *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 Board found that the appellant was not entitled to a higher rating, in part, because he was "employed throughout the period on appeal." R. at 16. The October 2017 examiner noted that the appellant was employed part time at the time of the examination because of "depression and lack of energy/motivation," symptoms that the examiner concluded "exacerbate[d]" the appellant's multiple mental health disabilities. R. at 825-27. Further, the appellant underwent a private vocational assessment where the examiner concluded that the appellant was unemployable, yet the Board failed to mention this evidence in its decision. *Compare* R. at 287, *with* R. at 5-18. Remand is required for the Board to address this favorable evidence and otherwise provide an adequate statement of reasons or bases for its degree-of-disability determination for the appellant's PTSD. *See Caluza*, 7 Vet.App. at 506.

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 December 17, 2018, Board decision will be SET ASIDE and the matters will be REMANDED for readjudication.

DATED: April 30, 2020

Copies to:

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VA General Counsel (027)