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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-1774

THOMAS F. MANTING, 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*: Vietnam War veteran Thomas F. Manting appeals through counsel that part of a November 19, 2018, Board of Veterans' Appeals decision that denied service connection for an acquired psychiatric disability other than post-traumatic stress disorder (PTSD), hypertension, and right ear hearing loss.[1] Record (R.) at 5-17. The appellant argues that the Board provided an inadequate statement of reasons or bases for denying the three claims on appeal. Appellant's Brief at 3-15. The Secretary concedes that the Board provided an inadequate statement of reasons or bases for denying the appellant's psychiatric disorder claim, but argues that the remainder of the decision on appeal should be affirmed. Secretary's Brief at 9-15. For the following reasons, the Court will set aside that part of the November 2018 Board decision on appeal and remand the matters for further development and readjudication.

[1] The Board also found that new and material evidence had been submitted to reopen the appellant's right ear hearing loss claim. The Court will not disturb this favorable finding. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). Additionally, the Board found that new and material evidence had not been submitted to reopen a service-connection claim for PTSD. The appellant presents no argument as to this matter 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).

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. Air Force from July 1963 to August 1967, including service in Vietnam, as an aircraft mechanic. R. at 414 (DD Form 214). A comparison of the appellant's entrance and separation examination reveals that his right ear hearing underwent a threshold shift at all frequencies relevant for VA hearing disability determinations. *Cf.* R. at 408 *with* R. at 385.

IV.

The appellant sought to reopen a finally denied right-ear hearing loss claim and also filed new service-connection claims for hypertension and for an acquired psychiatric condition, other than PTSD, in February 2014. R. at 432-36. In filing for benefits for hypertension, he alleged that the condition was directly related to service, caused by a service-connected medical condition, caused by medication taken for a service-connected condition, or caused by exposure to Agent Orange. R. at 434.

In April 2014, a VA examiner provided a negative nexus opinion regarding the appellant's right ear hearing loss, reasoning that he had normal hearing thresholds upon separation from the military and there were no threshold shifts. R. at 163.

V.

In November 2018, the Board denied service connection for an acquired psychiatric disability other than PTSD, hypertension, and right ear hearing loss. In concluding that a medical examination was not warranted to decide the appellant's acquired psychiatric disability claim, the Board found that, aside from a remote diagnosis of PTSD in 2010, there was no other medical evidence to suggest that the appellant had a current mental health condition. R. at 16. The hypertension claim was also denied, in part because "as PTSD is not entitled to service connection, secondary service connection to this condition is not possible." R. at 15. The Board relied on the April 2014 VA examiner's opinion to deny service connection for right ear hearing loss. R. at 14. This appeal followed.

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).

"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 provided an inadequate statement of reasons or bases for finding that the appellant did not have a current mental health disability. *See* 38 U.S.C. § 7104 (d)(1). Although the Board cited a 2010 PTSD diagnosis, it failed to address the underlying symptoms that were found to be present when the diagnosis was given. *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). It is therefore unclear whether the Board properly considered whether the appellant had a current mental health disability. Remand is required for the Board to provide an adequate statement of reasons or bases for its decision. *See* 38 U.S.C. § 7104(d)(1).

The Court also concludes that the matter of hypertension is inextricably intertwined with the acquired psychiatric disability claim. *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). Because the appellant has alleged that his hypertension could be secondarily related to his psychiatric disability claim, any adjudication of the psychiatric disability claim may have a "significant impact" on the hypertension claim. *See id.* The Court will therefore also remand the hypertension matter as inextricably intertwined.

Finally, the Court concludes that the Board erred in failing to return the April 2014 VA examination for clarification. *See* 38 C.F.R. § 4.2. Although the examiner's negative conclusion was based on a lack of threshold shifts in service, the appellant's separation examination evidences a threshold shift at every frequency from his entrance examination. *Cf.* R. at 408 *with* R. at 385. The examiner's rationale is at best unclear. Remand of the right ear hearing loss claim is required for the Board to return the April 2014 VA examination for clarification. *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). On remand, the appellant may present, and the Board must consider, any additional evidence and arguments, including the evidence cited in the appellant's brief that is related to a potential connection between hypertension and Agent Orange exposure. *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 reasons, that part of the November 19, 2018, Board decision on appeal is VACATED and the matters are REMANDED for further development and readjudication.

DATED: May 8, 2020

Copies to:

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