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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-0013

LILLIAN GREEN, 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*: Lillian Green, widow of veteran John Reed, appeals through counsel that part of a November 8, 2018, Board of Veterans' Appeals decision that denied an initial disability rating for bipolar disorder with substance abuse higher than 30% from December 18, 2000, to January 16, 2006, and 50% thereafter.[1] Record (R.) at 4-19. The appellant argues that the Board erred by prematurely denying entitlement to higher ratings for bipolar disorder when it also remanded the matter of a total disability rating based on individual unemployability (TDIU) for further development. Appellant's Brief at 9-14. The appellant also presents other arguments pertaining to the merits of the Board's disability ratings determinations that the Court will not address in this appeal. *See* Appellant's Brief at 14-29. For the following reason, the Court will set aside that part of the November 2018 Board decision on appeal and remand the matters to be adjudicated with TDIU.

[1] The Board also remanded the matter of a total disability rating based on individual unemployability (TDIU) for further development. This matter is not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997).

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 the Secretary 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 of 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*. He then became a U.S. attorney for the district of New Jersey. *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 veteran served on active duty in the U.S. Navy from October 1981 to October 1985 as a machinist mate. R. at 1983 (DD Form 214). He was assigned to the U.S.S. *Josephus Daniels*. *See id*.

IV.

In December 2009, the veteran was granted service connection for bipolar disorder effective December 18, 2000. R. at 4015-34. He then died in January 2012 while his appeal of the appropriate disability rating was still in appellate status. R. at 3795. The appellant was substituted into the appeal. R. at 3813, 3786-87. In September 2015, the regional office granted service connection for the veteran's substance abuse and incorporated the diagnosis in the issue of bipolar disorder. R. at 3729.

V.

In November 2018, the Board denied an initial disability rating for bipolar disorder with substance abuse higher than 30% from December 18, 2000, to January 16, 2006, and 50% thereafter. R. at 4-19. The Board also remanded the matter of TDIU in the decision stating,

> The question of whether the Veteran's service-connected bipolar disorder with substance abuse prevented him from maintaining long term employment has been raised by the record. See December 2011 Veteran lay statement. When a request for a TDIU is made during the pendency of a claim, whether expressly raised by a veteran or reasonably raised by the record, it is not a separate claim for benefits, but rather involves an attempt to obtain an appropriate rating for a disability as part of the initial adjudication of the claim. *Rice v. Shinseki*, 22 Vet. App. 447, 453-454 (2009).

R. at 18-19. The Board then remanded the matter of TDIU for further development, including to obtain a medical opinion as to the functional effects of the service-connected disabilities alone on the veteran's ability to obtain or maintain substantially gainful employment. R. at 19. This appeal followed.

VI.

The issue of entitlement to TDIU, "whether expressly raised by a veteran or reasonably raised by the record, is not a separate claim for benefits, but rather . . . part of the initial adjudication of a claim or . . . part of a claim for increased compensation." *Rice*, 22 Vet.App. at 453.

VII.

The Court will remand the matters of the appropriate rating for bipolar disorder to be adjudicated with the matter of TDIU. *See id*. TDIU was remanded in the Board's decision for a medical opinion. R. at 18-19. Not only does the Board correctly note that the matter of TDIU is part of the attempt to obtain the appropriate rating for the veteran's bipolar disorder, *see* R. at 18-19, any further development may affect the adjudication of the matters currently on appeal.

Because the Court is remanding the matters on appeal, 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.").

VIII.

For the foregoing reason, that part of the November 8, 2018, Board decision on appeal is SET ASIDE and the matters are REMANDED to be adjudicated with the matter of TDIU.

DATED: May 8, 2020

Copies to:

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