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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-6976

DOROTHY C. FOGG, 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*: Dorothy C. Fogg, surviving spouse of Vietnam War veteran Johnny M. Fogg, appeals through counsel a September 6, 2018, Board of Veterans' Appeals decision denying entitlement to service connection for the cause of the veteran's death. Record (R.) at 4-6. The appellant argues that the Board (1) applied the wrong legal standard for the duty to assist, (2) failed to address favorable medical and lay evidence bearing on the duty to assist, and (3) clearly erred in finding that the duty to assist did not require a medical opinion to be obtained here. Appellant's Brief at 12-19. On September 9, 2019, the Secretary filed an opposed motion to strike the appellant's brief, in part. The Court will deny the motion as moot. For the following reason the Court will set aside the Board's September 2018 decision, and remand the matter 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' 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 Act of Mar. 23, 1792, ch. 11, 1 U.S. Stat 243 (1792) (repealed in part and amended by Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (1793)).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[1] wrote a letter[2] to President George Washington on behalf of the Circuit Court for the District of New York[3] 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 desire to manifest, on all proper occasions and in every proper manner their high respect for the national legislature." *Id*.

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[1] 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.

[2] 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.

[3] 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).

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[4] 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[5] 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.

The veteran served honorably in the U. S. Army as an armor intelligence specialist from August 1967 to August 1969, including combat service in the Republic of Vietnam. R. at 85. The

[4] 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.

[5] 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).

veteran received multiple awards during his service including the Combat Infantryman's Badge. R. at 85.

IV.

The veteran died on September 6, 1981. R. at 519. His death certificate lists a closed head injury due to a motor vehicle accident as the immediate cause of death and alcohol intoxication as a "significant condition contributing to death but is not related to" the cause, the veteran's closed head injury. R. at 519.

In May 2014, the appellant filed a claim for dependency and indemnity compensation (DIC) benefits for the cause of the veteran's death, contending that her husbands undiagnosed post-traumatic stress disorder (PTSD) led to alcohol abuse which contributed to his death. R. at 219-23. With her claim, the appellant submitted multiple lay statements detailing the veteran's PTSD symptoms, behavior, and alcohol use after returning from combat service in Vietnam. R. at 256-62.

V.

In the September 2018 decision on appeal, the Board determined that a medical opinion was not required to decide the appellant's DIC claim. R. at 8. In making this determination, the Board stated that:

> A medical opinion is required when needed to make a decision on the claim. 38 U.S.C. § 5103A(d)(1); *DeLaRosa v. Peak*, 515 F.3d 1319 (Fed. Cir. 2008). VA is not required to obtain an opinion when no reasonable possibility exists that such assistance would aid in substantiating the claim. *Wood v. Peake*, 520 F.3d 1345, 1348 (Fed. Cir. 2008). Here, the appellant's assertion, without any other supporting evidence, such as a treatise, that [the veteran's] non-service-connected PTSD caused the Veteran to drink is insufficient to trigger VA's duty to provide an examination in the context of a service connection claim. *Waters v. Shinseki*, 601 F.3d 1274, 1277 (Fed. Cir. 2010).
>
> The Board notes that even if the Board were to accept the diagnosis of PTSD, there is no probative medical evidence that adequately establishes that the Veteran's alcohol abuse was secondary to PTSD. Further, the death certificate while listing alcohol intoxication as another significant condition contributing to death, determined it did not relate to the cause of death. The appellant's statements and those of family and friends, that the Veteran had PTSD and resulting alcohol abuse, which lead to his death, are also are not competent evidence as questions of diagnosis and etiology and conditions causing or contributing to or hastening death

> due to the listed causes, are distinctly medical ones beyond the purview of lay knowledge. *Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007).

R. at 8.

VI.

When any veteran dies after December 31, 1956, from a service-connected or compensable disability, the Secretary shall pay dependency and indemnity compensation to such veteran's surviving spouse, children, and parents. 38 U.S.C. § 1310. The death of a Veteran will be considered as having been due to a service-connected disability when the evidence establishes that a service-connected disability was either the principal or a contributory cause of death. 38 U.S.C. § 1310; 38 C.F.R. § 3.312(a)(2019).

Congress has provided that VA has a duty to assist claimants. 38 U.S.C. § 5103A. Although section 5103A(d) specifies when this duty shall include a medical examination or opinion regarding disability compensation claims, the Federal Circuit has clarified that section 5103A(a) and not section 5103A(d) is the proper provision for application when determining whether a medical opinion is warranted in the context of a DIC claim. *DeLaRosa v. Peake*, 515 F.3d 1319, 1321-22 (Fed. Cir. 2008)). A medical opinion in the DIC context is required "whenever such an opinion is "necessary to substantiate the claimant's claim." *Wood v. Peake*, 520 F.3d 1345, 1348 (Fed. Cir. 2008), quoting 38 U.S.C. § 5103A(a)(1) and citing *DeLaRosa*, 515 F.3d at 1322. A medical examination, however, is not warranted when "no reasonable possibility exists that such assistance would aid in substantiating the claim." 38 U.S.C. § 5103A(a)(2); *see also Wood*, 520 F.3d at 1348.

"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 first concludes that the Board provided an inadequate statement of reasons or bases for finding that "the death certificate while listing alcohol intoxication as another significant condition contributing to death, determined it did not relate to the cause of death." R. at 8. The death certificate makes clear that alcohol intoxication contributed towards the appellant's death, but was not the *direct* cause of the appellant's closed head injury. *See* R. at 519. The Board appears to have merely misinterpreted the meaning of the death certificate.

The Court also concludes that the Board provided an inadequate statement of reasons or bases for finding that a medical examination was not warranted here. *See* 38 U.S.C. §§ 5103A(a); 7104(d)(1). It is unclear why the Board required more than lay testimony to provide a medical examination to determine whether the veteran had PTSD and whether alcohol abuse was a symptom of this condition. *See* R. at 8. The lay statements detail the veteran's post-service symptoms and it is unclear why these statements were not competent evidence to allow an examiner to provide an opinion or how "no reasonable possibility exists" that a medical examination "would aid in substantiating the claim." 38 U.S.C. §§ 5103A(a)(2). 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), and remand is warranted for the Board to determine whether an examination is warranted under 38 U.S.C. §5103A(a).

Because the Court is remanding the matter, 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 included in his brief. *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.

The Secretary's September 9, 2019, motion to strike the appellant's brief is denied as moot. For the foregoing reason, the Board's September 6, 2018, decision is SET ASIDE and the matter is REMANDED for readjudication.

DATED: May 8, 2020

Copies to:

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