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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-7265

DEMETRIUS L. SMITH, 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*: U.S. Marine Corps veteran Demetrius L. Smith appeals, through counsel, that part of a November 15, 2018, Board of Veterans' Appeals decision that denied his claim that a January 13, 1988, rating decision that reduced his disability rating for a service-connected left knee disability contained clear and unmistakable error (CUE). Record (R.) at 4-14.[1] The appellant argues that the Board erred by finding that the January 1988 rating decision did not contain CUE because (1) the proper regulations were not applied; (2) this theory of CUE was reasonably raised; (3) there was no evidence to weigh; and (4) that finding was outcome determinative; alternatively, the appellant argues that the regional office (RO) in January 1988 incorrectly applied the Diagnostic Code (DC) and made an erroneous factual finding. Appellant's Brief at 9-28. For the following reason, the Court will reverse the Board's finding that the appellant did not raise the theory of CUE challenging the rating reduction procedures, otherwise set aside

[1] The Board also found that the appellant's degenerative joint disease of the lumbar spine and right knee were caused by his service-connected left knee disability. R. at 5. The Court will not disturb these favorable findings. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). Additionally, the Board found that the appellant did not appeal the January 1988 rating decision that reduced the disability rating for his service-connected left knee. R. at 5. The appellant presents no argument as to this finding, 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).

that part of the November 2018 Board decision on appeal, 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 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 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").

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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 riding. *See* RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND the FEDERAL SYSTEM (7th ed. 2015).

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.

III.

The appellant served on active duty service in the U.S. Marine Corps from September 1983 to December 1985 as a machine gunner. R. at 2453 (DD Form 214). In September 1985, the appellant underwent an examination to determine whether he should be medically discharged following a November 1984 accident. R. at 1197-200. The appellant was working as a gate guard at the Naval Air Station Alameda when he was struck by a vehicle and knocked onto the car. *Id*. The appellant "was treated with splinting and symptomatic treatment" until January 1985 when he underwent left knee arthroscopic surgery and was diagnosed with discoid lateral meniscus and a Grade I chondromalacia patella. R. at 1197. The medical examination board (MEB) opined that the appellant's left knee disability rendered him unfit for full duty because "he may have permanent partial disability." R. at 1199. The appellant was granted a 10% disability rating for his discoid lateral meniscus under 38 C.F.R. § 4.71a, DC 5259. R. at 195. In December 1985, the appellant was medically discharged. R. at 2453.

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[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).

IV.

In January 1986, the appellant applied for disability benefits for his left knee. R. at 2469. In May 1986, the RO granted a 10% disability rating. R. at 2446. The RO scheduled another VA examination in December 1987 "for anticipated improvement." *Id.*

In December 1987, the appellant underwent a follow-up VA examination. R. at 2429-34. The examiner noted that the appellant's knee mostly bothered him during cold weather, but that his knee "clicks with every step." R. at 2429, 2433. The examiner confirmed the audible "click," found tenderness at "the juncture of the lower end of the patella and the patella tubercle," and observed a limited ROM on flexion of 130 degrees. R. at 2433. The examiner also noted that "as it warms up, [the appellant's left knee] is less painful." *Id.* X-rays showed that the appellant had "minimal, if any, joint effusion and there is no evidence of soft tissue swelling. No radiologic abnormalities of the knee demonstrated." R. at 2432. The examiner diagnosed the appellant with left knee medial meniscectomy. R. at 2434.

In January 1988, the RO reduced the appellant's disability rating from 10% to 0 under DC 5259, reasoning that the December 1987 VA examination report "demonstrate[s] that a compensable evaluation is no longer supported by the evidence of record." R. at 2425.

In January 2009, the appellant submitted a request to revise the January 1988 RO decision that reduced the appellant's disability rating for his service-connected left knee condition based on CUE. R. at 2316, 2320. In January 2017, the appellant submitted a statement arguing that the January 1988 RO rating decision had CUE in it. R. at 127. In March 2018, the appellant argued that the RO committed CUE in January 1988 by failing "to apply correct statutory or regulatory provisions" when it reduced his left knee disability rating. R. at 53.

V.

In November 2018, the Board found that there was no CUE in the January 1988 rating decision. R. at 5-16. The Board cited 38 C.F.R. § 3.105(e) (1988) and concluded that the appellant "ma[de] no contention as to the application of the reduction procedures in the January 1988 rating decision," and that "[n]o CUE issue based on this theory has been raised or reasonably raised by the record." R. at 12. This appeal ensued.

VI.

The Board has a duty to sympathetically read a pro se veteran's submission to determine whether the requirements for a CUE request have been met, including all potential theories raised by the evidence, and to apply all pertinent laws and regulations. *See Andrews v. Principi*, 18 Vet.App. 177, 185 (2004) *aff'd sub. nom. Andrews v. Nicholson*, 421 F.3d 1278, 1383 (Fed. Cir. 2005). A veteran who is represented by a veterans service organization is considered pro se. *See Conner v. Peake*, 552 F.3d 1362, 1368 (Fed. Cir. 2009).

VII.

The Court concludes that the Board's determination that no CUE issue based on a theory of the improper application of rating reduction procedures was raised by the record or the appellant was clearly erroneous. *See* 38 U.S.C. 7261 (a)(3); *see also* 38 C.F.R. §§ 4.2 (1988), 4.10 (1988), 4.13 (1988). The Board found that the appellant "makes no contention as to application of the reduction procedures in the January 1988 rating decision . . . [and] no CUE issue based on this theory has been raised or reasonably raised by the record." R. at 12. However, the appellant raised a theory of CUE based on his rating reduction three separate times. R. at 53-54, 127, 2136, 2320. Specifically, in his March 2018 statement before the Board, the appellant clearly argued that the Board failed to apply the correct "regulatory provisions," which would include any provisions pertaining to the rating reductions when construed sympathetically or otherwise. R. at 53; *see also Andrews*, 18 Vet.App. at 185. The appellant's continued argument that his knee rating was improperly reduced because of a lack of improvement supports this theory of CUE as well because it implies there was no improvement, and that the Board failed to properly apply the rating reduction regulations. The Court will reverse the Board's finding that this CUE issue was not raised by the record or the appellant. *See* 38 U.S.C. § 7261 (a)(3). Remand is required for the Board to address this theory of CUE. *See Andrews*, 18 Vet.App. at 185.

Because the Court is remanding the matter 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, the Board's finding that the theory of improper rating reduction procedures constituting CUE was not raised is REVERSED. The remainder of the November 15, 2018, Board decision on appeal is SET ASIDE and the matter is REMANDED for readjudication.

DATED: May 11, 2020

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)