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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-4772

CONNIE E. HOLLANDER, 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. Army veteran Connie E. Hollander appeals through counsel a November 22, 2017, Board of Veterans' Appeals decision denying service connection for post-traumatic stress disorder (PTSD). Record (R.) at 2-19. The appellant argues that reversal is warranted and service connection should be granted because the Board was bound by a favorable statement that it made in an October 2013 remand; in the alternative, the appellant argues that remand is warranted because the Board failed to provide an adequate statement of reasons or bases for changing its former favorable finding. Appellant's Brief at 11-25. The Secretary concedes that remand is warranted because the Board erred by failing to comply with a January 2013 joint motion for remand (JMR), and failed to provide an adequate statement of reasons or bases for its decision; but the Secretary also maintains that reversal is not warranted. Secretary's Brief at 1-13.

On June 6, 2019, the appellant filed an opposed motion for oral argument in the matter. On October 11, 2019, the appellant submitted an unopposed motion to stay proceedings in the matter pending a decision in *Smith v. Wilkie*, U.S. Vet. App. No. 18-1189 (submitted to panel August 13, 2019). The Court granted the motion to stay proceedings on October 17, 2019. *Smith* was decided on April 27, 2020. *Smith v. Wilkie*, ___ Vet.App. ___, 2020 WL 1982279 (April 27, 2020). Accordingly, the Court will lift the stay in this matter. The Court will deny the appellant's motion

for oral argument because the appellant has not shown that oral argument will "materially assist in the disposition of [this] appeal." *Hackett v. Principi*, 18 Vet.App. 477, 478 (2004). For the following reason the Court will set aside the Board's November 2017 decision and remand the matter for proceedings consistent with this decision.

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*.

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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[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).

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 appellant served on active duty in the U.S. Army from February 1963 to December 1964 as a light weapons infantryman. R. at 1357 (DD Form 214).

IV.

In September 2005, the appellant filed a claim for service-connected benefits based on posttraumatic stress disorder (PTSD). R. at 1276.

In October 2013, the Board remanded the matter of service connection for PTSD for a psychological evaluation, finding that 38 C.F.R. § 3.304(f)(3) applied to the appellant's claim. R. at 318-23. When remanding the matter, the Board stated that "the Veteran has reported fear of being attacked, which is consistent with the time, place, and circumstances of his service in Korea." R. at 321.

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[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).

V.

In the November 2017 decision on appeal, the Board stated that the appellant's claim for PTSD "must fail even after applying 38 C.F.R. §3.304(f)(3) because the Board finds that the claimed stressors related to fear of hostile military activity from the appellant's Korea service simply are not consistent with the circumstances of such service." R. at 7.

VI.

> [T]he principles of fair process require the Board to provide claimants notice and an opportunity to respond when it purports to reverse prior assertions that evidence is credible or otherwise satisfactory to establish a fact necessary to the claim or when the Board's order would leave the impression that it had determined that the evidence was credible.

Smith v. Wilkie, ___ Vet.App. ___, 2020 WL 1982279 at *1.

VII.

The Court concludes that the Board erred by failing to provide the appellant with proper notice and the opportunity to respond when it reversed a prior favorable finding. *See id*. In October 2013, the Board remanded the matter of service connection for PTSD for an examination, finding that the appellant's reported in-service PTSD stressor was "consistent with the time, place, and circumstances of his service." R. at 321. In the decision on appeal, the Board found "that the claimed stressors related to fear of hostile military activity from the appellant's Korea service simply are not consistent with the circumstances of such service." R. at 7. The Board did not explain why its factual determination had changed and did not provide the appellant notice or an opportunity to respond to the change. R. at 7. Remand is warranted for the Board to provide the appellant with notice and an opportunity to respond to any reversal of fact pertaining to the appellant's claimed in-service stressor. *See Smith v. Wilkie*, ___ Vet.App. ___, 2020 WL 1982279 at *1.

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. *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 appellant's motion for oral argument is denied and the stay in this matter is lifted. The Board's November 22, 2017, decision is SET ASIDE and the matter is REMANDED for proceedings consistent with this decision.

DATED: May 11, 2020

Copies to:

Sean A. Ravin, Esq.

VA General Counsel (027)