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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-1771

JEFFERY L. RIGBY, 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*: Jeffery L. Rigby appeals through counsel that part of a November 15, 2018, Board of Veterans' appeals decision that denied an initial disability rating in excess of 50% for major depressive disorder.[1] Record (R.) at 4-14. The appellant argues that the Board provided an inadequate statement of reasons or bases for denying a higher rating for his service-connected acquired psychiatric disability. Appellant's Brief at 2-4. For the following reason, the Court will set aside 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, §

[1] The Board also remanded matters related to sleep apnea, an anterior cruciate ligament reconstruction, and special monthly compensation for loss of a creative organ. These matters are not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997).

402, 102 Stat. 4105, 4122 (1988). Before the VJRA, VA rules, regulations, and decisions lived in "splendid isolation," generally unconstrained by judicial review for nearly 60 years. *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 Act of Mar. 23, 1792, ch. 11, 1 U.S. Stat 243 (1792) (repealed in part and amended by Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (1793)).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 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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[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 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, 173 L. Ed. 2d 532 (2009) (Souter, J., dissenting) (stating that congressional "solicitude for veterans is plainly reflected in the Veterans Judicial Review Act of 1988, 38 U.S.C. § 7251 et seq. [VJRA], as well as in subsequent laws that '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 (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, 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.

[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).

The appellant served on active duty in the U.S. Navy from October 1987 to August 1993 as a sonar maintenance man. R. at 1524 (DD Form 214). He served aboard the U.S.S. *Kirk* and was awarded the Southwest Asia Service Medal with Bronze Star among other commendations for his service. *See id.*

IV.

The appellant is service connected for right knee and right hip conditions. *See* R. at 607. In March 2014, he filed for service-connected benefits for an acquired psychiatric disorder secondary to pain caused by his right knee and hip conditions, and is currently service connected for major depressive disorder. R. at 859-61.

V.

In November 2018, the Board denied an initial disability rating in excess of 50% for major depressive disorder. R. at 4-14. The Board first noted that the appellant had submitted a June 2014 statement where he reported that his major depressive disorder caused "chronic sleep problems, danger of hurting self or others, depression, difficulty making decisions, heavy use of alcohol, neglect of family, sense of helplessness, suicidal feelings/thoughts, and taking medications for mental conditions." R. at 9. In denying a higher rating, the Board then briefly addressed an April 2011 VA treatment record, 2013 private treatment records, and a September 2014 VA examination. *Id.* The only symptom thoroughly analyzed in the decision was the appellant's single report of suicidal ideation that the Board found insufficient to warrant a higher rating. This appeal ensued.

VI.

VA rates mental disorders under a general rating formula. *See* 38 C.F.R. 4.130 (2019). Each specific rating criterion contains the phrase "such symptoms as" followed by a list of symptoms. *See id.* The list of symptoms for each rating is therefore nonexhaustive, meaning that VA is not required to find the presence of all, most, or even some of the enumerated symptoms to assign a particular evaluation. *Vazquez-Claudio v. Shinseki,* 713 F.3d 112, 115 (Fed. Cir. 2013); *Mauerhan v. Principi,* 16 Vet.App. 436, 442 (2002).

However, because "[a]ll nonzero disability levels [in § 4.130] are also associated with objectively observable symptomatology," and the plain language of the regulation makes it clear that "the veteran's impairment must be 'due to' those symptoms," "a veteran may only qualify for a given disability rating under § 4.130 by demonstrating the particular symptoms associated with that percentage, or others of similar severity, frequency, and duration." *Vazquez-Claudio*, 713 F.3d at 116-17. In assigning a disability rating for a mental disorder, VA is required to perform a "holistic analysis" in which it "assesses the severity, frequency, and duration of the signs and symptoms of the veteran's service-connected mental disorder; quantifies the level of occupational and social impairment caused by those signs and symptoms; and assigns an evaluation that most nearly approximates that level of occupational and social impairment." *Bankhead v. Shulkin*, 29 Vet.App. 10, 22 (2017).

"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 concludes that the Board failed to assess the frequency severity and duration of the appellant's symptoms. *See Vasquez-Claudio*, 713 F.3d at 116-17. Although the Board acknowledged that the appellant had reported multiple symptoms, it failed to holistically analyze the symptoms of the appellant's service-connected mental disorder pursuant to the Court's holding in *Bankhead*. *See* 29 Vet.App at 22. Remand is required for the Board provide an adequate statement of reasons or bases for its degree of disability determination regarding the appellant's major depressive disorder. 38 U.S.C. § 7104(d)(1).

Because the Court is remanding the appellant's claim, 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 15, 2018, Board decision is SET ASIDE and the matter is REMANDED for readjudication.

DATED: May 12, 2020

Copies to:

John S. Berry, Esq.

VA General Counsel (027)