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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-0105

BRUCE E. HOOPLE, 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*: Vietnam War veteran Bruce E. Hoople appeals, through counsel, that part of a September 11, 2018, Board of Veterans' Appeals decision that denied service connection for penile shortening secondary to his service-connected prostate cancer.[1] Record (R.) at 4-11. The appellant argues that the Board erred by (1) relying on an inadequate medical opinion; and (2) failing to provide an adequate statement of reasons or bases for discounting favorable evidence. Appellant's Brief at 4-13. For the following reason, the Court will set aside that part of the September 2018 Board decision on appeal and remand the matters 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

[1] The Board also remanded claims for service connection for (1) bilateral lower extremity peripheral neuropathy; (2) bilateral upper extremity peripheral neuropathy; (3) chloracne; (4) bilateral hearing loss; (5) a nose disorder; (6) a sinus disorder; (7) a left toe disorder; (8) hypertension, secondary to service-connected coronary artery disease; (9) obstructive sleep apnea (OSA), claimed as secondary to an in-service nasal fracture; and (10) impaired cognitive abilities, secondary to non-service-connected OSA. These matters are not before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 483 (1997).

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

[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).

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, 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.

[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. *Id.* In 2005, President George W. Bush chose Alito to replace retiring Supreme Court Justice Sandra Day O'Connor. *Id.*

[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).

III.

The appellant served on active duty in the U.S. Army from December 1965 to November 1967 as a stock control account specialist. R. at 1745. The appellant is presumed to have been exposed to Agent Orange based on his service in Vietnam. R. at 7-9, 1933.

IV.

In April 2010, the appellant underwent a radical prostatectomy to remove this cancer. R. at 2103. In July 2010, the appellant's wife submitted a statement in support of his claim for service connection for prostate cancer, status post-operative radical prostatectomy that the appellant was unable to maintain an erection. R. at 2085. In August 2010, the appellant was granted service connection for prostate cancer, status post-operative radical prostatectomy as of May 10, 2010. R. at 1980. In February 2011, the regional office (RO) granted the appellant special monthly compensation (SMC) for loss of a creative organ as of May 10, 2010. R. at 1936.

In November 2015, the appellant submitted a claim for disability benefits for penile shortening secondary to prostate cancer. R. at 739.

In March 2016, the appellant underwent a VA examination. R. at 338-42. The examiner noted that the appellant had been diagnosed with penile shortening since 2010. R. at 338. The examiner noted that the appellant suffered from "prostate shortening" as a residual from his neoplasm. R. at 341. Upon physical examination, the examiner found that the appellant's penis, testes, and epididymis were "normal." R. at 340. The examiner concluded that

> the current prostate shortening (the prior measurements of which I am not privy, not having now nor previously measured his penis) secondary to the radical prostatectomy is less likely as not . . . the result of prostate cancer post[-]operative status radical prostatectomy[.] The removal of the prostate does not incur removal of the testes nor the adrenal gland and thus does not per se reduce the male hormones unless associate with hormonal or chemotherapy of which [the appellant] was not subjected.

R. at 342. That same month, the RO denied the appellant's claim for penile shortening. R. at 269-70.

In November 2016, the appellant attended a VA urology appointment. R. at 50-51. The VA examiner "[e]xplained [to the appellant] that [penile shortening] is a likely and somewhat expected outcome of a radical prostatectomy." R. at 50.

In January 2017, the appellant submitted two medical article abstracts showing complaints of "penile shortening following radical prostatectomy[, which] can be a devastating and unwelcome side effect," and complaints of penile shortening post radical prostatectomy "a median of 5.53 years after prostatectomy." R. at 170-71. In January 2018, the RO continued to deny service connection for penile shortening. R. at 98-112.

V.

In September 2018, the Board denied the appellant service connection for penile shortening. R. at 4-13. The Board relied on the March 2016 VA examination report and found it more probative than the November 2016 VA urology followup note because "it does not provide a rationale specific to this" appellant. R. at 6. The Board did not discuss the medical literature the appellant submitted in January 2017. *See* R. at 6-7. This appeal ensued.

VI.

When the Secretary undertakes to provide a veteran with a VA medical examination or opinion, he must ensure that the examination or opinion is adequate. *Barr v. Nicholson*, 21 Vet.App. 303, 311 (2007). A VA medical examination or opinion is adequate "where it is based upon consideration of the veteran's prior medical history and examinations," *Stefl v. Nicholson*, 21 Vet.App. 120, 123 (2007), "describes the disability . . . in sufficient detail so that the Board's 'evaluation of the claimed disability will be a fully informed one.'" *Id.* (quoting *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994)); s*ee also Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) ("[A] medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two."). VA is required to "return the [examination] report as inadequate for evaluation purposes" if the report "does not contain sufficient detail." 38 C.F.R. § 4.2 (2019).

"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 finds that the Board provided an inadequate statement of reasons or bases for relying on the March 2016 VA examination. 38 U.S.C § 7104(d)(1). The Board found this examination probative, citing the examiner's rationale "that prostate removal does not incur removal of the testes or adrenal gland, and accordingly, does not reduce the male hormones unless associated with hormonal or chemotherapy which the [appellant] did not undergo." R. at 6. Yet, the appellant has submitted a medical study that concludes that the removal of the prostate alone, even without radiotherapy, causes penile shortening. R. at 170-71. The Board did not address this evidence in its decision. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995)(finding that the Board must account for and provide the reasons for its rejection of any material evidence favorable to the claimant), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996). Remand is required for the Board to provide an adequate statement of reasons or bases for relying on the March 2016 VA examination, and to address all favorable evidence of record. 38 U.S.C. § 7104(d)(1), *Caluza*, 7 Vet.App. at 506. The Court notes that it is unclear, at this time, how the Board could rely on the March 2016 VA examiner's rationale given that the evidence submitted by the appellant is directly contrary to opinion.

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 portion of the September 11, 2018, Board decision on appeal is SET ASIDE and the matter is REMANDED for readjudication.

DATED: May 12, 2020

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