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**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 19-0919

THOMAS S. PRATT, 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*: Thomas S. Pratt, through counsel, appeals a December 17, 2018, Board of Veterans' Appeals decision that denied a change in the vocational rehabilitation (VR) training program under chapter 31 of title 38 of the U.S. Code (U.S.C.). Record (R.) at 3-18. The appellant argues that the Board (1) failed to comply with two previous Court decisions when it erroneously found that the appellant's concurrence in the change proposed to his vocational rehabilitation plan required him to seek employment as a pharmacist; (2) erred in concluding that no vocational rehabilitation goal was feasible and erred in continuing to use feasibility criteria explicitly rejected by the Court; (3) erred by assuming no employment was possible for the appellant when it rejected his request to change his vocational goal from actor to pharmacist; and (4) erred by changing a determination without providing a reason for this change. Appellant's Brief at 12-21.

The Secretary responds that that remand is warranted because the Board did not provide an adequate statement of reasons or bases for finding that the appellant could not change his VR program because of the infeasiblity of achieving his vocational goal of pharmacy. Secretary's Brief at 8. Specifically, the Secretary concedes that the Board failed to provide an adequate statement of reasons or bases to support its finding that "no vocational goal was reasonably feasible when

the Veteran requested a change in vocational goal to pharmacist.". Secretary's Brief at 10 (quoting R. at 16). The Secretary further concedes error regarding the Board's statement of reasons or bases. For the following reasons, the Court will set aside the December 2018 Board 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 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[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").

II.

[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 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.

[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).

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 August 1977 and again from May 1978 to April 1981 as a ground surveillance radar crewman. R. at 1379 (DD Form 214). During his service, the appellant suffered cold injuries to his hands and feet. *See* R. at 93.[6]

IV.

In October 1984, the appellant was granted service connection for residuals of frostbite to the hands and feet. R. at 3446-47. In June 1986, the appellant began seeking VR benefits to become an actor. R. at 3399-3400. After receiving VR benefits to pursue other careers, the appellant attempted to receive benefits for pharmacy school. *See* R. at 93. In July 1997, VA Rehabilitation and Counseling determined that the appellant had "a serious employment handicap based on [his] current service-connected disabilities [with] significant impairments upon [the appellant's] employability." R. at 631. VA Rehabilitation and Counseling also found, however,

[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.* 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.*

[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).

[6] The Court will cite its previous decision for certain facts. The Court notes that various facts are being included in the decision to reflect the appellant's behavior in this matter.

that "the pharmacist vocational goal . . . is not recommended as the most suitable vocational goal for you to pursue. This is due to the significant limitations from your disabilities, related to both upper and both lower extremities." R. at 631-32. While awaiting a determination on the availability of VR benefits, the appellant applied and was accepted to the University of Southern California's School of Pharmacy. *See* R. at 93.

On September 9, 1997, the appellant committed to a VA rehabilitation plan to pursue a degree in economics. *See* R. at 93. In agreeing to this plan, the appellant signed a statement acknowledging that he was required to

> [m]eet regularly with Counseling Psychologist, Nathan Griff and [VR] Specialist, (VRS) whenever scheduled to discuss matters related to your [VR] situation. If you cannot keep an appointment, immediately call the [VR] & Counseling Division . . . as much in advance of your appointment as possible. This helps us to provide timely assistance to all veterans.

*See* R. at 93-94.

The next day, the appellant filed a Notice of Disagreement (NOD) with the denial of benefits to pay for pharmacy school. *See* R. at 94. In November 1997, the appellant's VR counselor scheduled a meeting to help resolve matters associated with the appellant's pursuit of VR benefits. *Id.* The appellant apparently responded that "he had no interest in meeting with [the counselor]," and instead asked that VA proceed with his NOD. *Id.*

In January 1998, the regional office (RO) issued a Statement of the Case (SOC) explaining that VA had found the appellant's goal of becoming a pharmacist not feasible in light of his problems with extremity numbness and decreased dexterity. R. at 677-83. The RO also noted the appellant's failure to meet with his VR counselor and stated the law that, in seeking a change of VR plan, a veteran is required to "fully [participate]" in any change under 38 C.F.R § 21.94(b)(3). R. at 681.

In December 2005, the appellant's VR counselor wrote to the appellant, explaining why the appellant's request to change his vocational program to pharmacy was not approved:

> Unfortunately, Mr. Pratt, you have not been willing to meet with us or to provide all of the necessary information regarding the proposed vocational goal of pharmacist. Thus, we must make a negative determination regarding your interests in pursuing this vocational goal as it is not considered to be the most suitable or reasonably feasible vocational goal for you to prepare for, obtain and maintain.

R. at 94.

In February 2006, the appellant agreed to meet with his VR counselor and stated that his previous refusals stemmed from an "EEOC complaint pending against the Long Beach VAMC." *See* R. at 94. In March 2006, he submitted a letter stating in part that

> [o]n March 27, 2006 you again phoned me and stated, "there were three ways that this can be approved": (1) move to Nevada and get a job, (2) move to Nevada but do not get a job; the VAROLA will send my file to the Nevada office and recommend that they approve the pharmacist goal once I have the job; (3a) get a California license and get a job, and (3b) get a job with my Nevada license at the VA.
>
> However, none of these proposals is acceptable, as none reflects the agreement that was reached during our meeting on March 8, 2006, namely, that the goal of pharmacist could be approved if I agreed to assistance from VA Employment Service. That is what was I agreed to and that is what I am prepared to accept. Moreover, all these proposals appear to be inconsistent with the intent of Chapter 31, rehabilitation provided through services and assistance. Each of these proposals would require that I first obtain employment before I am entitled to receive any vocational rehabilitation services under Chapter 31. Needless to say, at that point I would not require any service or assistance under Chapter 31.

R. at 2449-50.

In the July 2013, the Board denied entitlement to a change in VR training because the appellant did not "fully *participate* in the efforts of the Vocational Rehabilitation Office to determine the feasibility of his change in vocational goal." R. at 1629 (emphasis in original). The appellant appealed that decision, and in June 2015, the Court vacated the July 2013 decision and remanded the matter for the Board to provide an inadequate statement of reasons or bases. R. at 138-46.

In October 2016, the Board again denied entitlement to a change in VR training, finding that the appellant had not concurred in the proposed change to the vocational goal "because he did not have a desire to obtain and sustain gainful employment as a pharmacist," and merely wanted to be reimbursed for his educational expenses. R. at 220. In reaching its negative determination, the Board found that VR "would be more likely if a different long-range goal from actor was established." R. at 218.

In June 2018, the Court vacated the October 2016 Board decision, stating:

> In June 2015, the Court held that the Board applied the wrong standard when it determined that the appellant did not fully participate under 38 C.F.R. § 21.94, because the Board had imposed an additional requirement that the appellant "'actually desire[] to obtain employment." R. at 145. The Board used the same

> rationale in making its determination in the decision on appeal, yet applied it to find that the appellant did not concur in the change. R. at 18. There is no requirement under 38 C.F.R.§ 21.94 that the appellant desire to obtain employment in pharmacology for him to concur in the proposed change in VR plan. Remand is required for the Board to comply with the June 2015 remand. *See Stegall v. West,* 11 Vet.App. 268, 271 (1998).

R. at 96-97.

V.

In December 2018, the Board issued the decision appeal, again denying the appellant's request for this change to his vocational rehabilitation plan, finding that the criteria for approving a change in the appellant's VR benefits were not met. R. at 15. The Board stated that

> [w]hen the Veteran requested a change in the vocational goal from actor to pharmacist, the Veteran had been unsuccessful in obtaining gainful employment as an actor after receiving the approved vocational training in acting. The Veteran is now in receipt of TDIU benefits and was unemployable due to service-connected disabilities effective from 1991, so establishment of a different long-range goal from actor would not be more likely to result in vocational rehabilitation because any vocational goal would not be reasonably feasible due to unemployability due to service-connected disabilities.

R. at 16. The Board also added VA lacks the authority to reimburse the veteran retroactively for past education and training that was never approved by VA. R. at 17.

VI.

When a veteran seeks vocational rehabilitation, VA will determine the reasonable feasibility of achieving a specific vocational goal. 38 C.F.R. § 21.53 (2019). The veteran, the counseling psychologist, or the VR specialist may request a change in the plan at any time. 38 C.F.R. § 21.94(a) (2019). A veteran may change his or her plan when (1) achievement of the current goal is no longer reasonably feasible; or (2) the veteran's circumstances have changed or new information suggests that rehabilitation is more likely if a different long-range goal is established; and (3) the veteran "fully participates and concurs" in the change. 38 C.F.R. § 21.94(b)(1)-(3).

"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 agrees with the parties that to deny a change in VR, the Board erred in relying on the fact that the appellant has established entitlement to TDIU since 1991. VA's regulation governing the continuance of total disability ratings provides that a TDIU cannot be reduced simply because a veteran is undergoing VR.[7] 38 C.F.R. § 3.343(c)(1) (2019).

The Court also agrees with the Secretary's concession that

> the Board did not provide an adequate statement of reasons or bases for its explicit or implicit rejection of favorable evidence in the record on the issue of whether the pharmacy vocational goal is reasonably feasible under 38 C.F.R. § 21.53(d). For example, Appellant was able to complete a degree in pharmacy, which is evidence that he was able to undergo training to achieve the pharmacy goal even if it is not dispositive on whether he is capable of working as a pharmacist in California. [R. at 2714]; *see* 38 C.F.R. § 21.53(d)(2) (consideration of whether the veteran's disabilities permit training for the goal). Although the Board did note that Appellant had some work as a pharmacist, it found that this was evidence against feasibility because of its duration. [R. at 16, 2-20]. But in making this finding the Board did not address evidence that he did not leave those jobs due to his disabilities. [R. at 1719, 1717-23] ("He noted that he left that position because his intern license expired in August, [sic.] 2003.").

Secretary's Brief at 11. Remand is required for the Board to provide an adequate statement of reasons or bases. 38 U.S.C. § 7104(d)(1); *see also Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

The Court notes that in its October 2016 decision the Board found that VR "would be more likely if a different long-range goal from actor was established." If the Board intends to find otherwise on remand, it must properly notify the appellant and allow him to meaningfully respond.

[7] The Court notes that VA has already reversed a reduction of TDIU benefits for this veteran based on the same regulation. *See* R. at 1276.

*See Smith v. Wilkie*, No. 18-1189, 2020 WL 1982279 (Apr. 27, 2020). Further, the Board is reminded that the Court has already concluded that "[s]imply because the appellant attempted multiple vocational endeavors prior to the pharmacy goal is irrelevant to a proposed change other than to the question whether the 'achievement of the current goal is no longer reasonably feasible' under 38 C.F.R. § 21.94(b)(1)." R. at 1276. The Court has also concluded multiple times "that there is no requirement under 38 C.F.R.§ 21.94 that the appellant desire to obtain employment in pharmacology for him to concur in the proposed change in VR plan." R. at 96-97. On remand, the Board is reminded that it is required to comply with remand orders from the Court. *See Stegall*, 11 Vet.App. at 171.

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 reasons, the December 17, 2018, Board decision is SET ASIDE and the matter is REMANDED for readjudication.

DATED: May 13, 2020

Copies to:

Mark D. Matthews, Esq.

VA General Counsel (027)