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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-1975

LENZY LOFTON, 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*: Korean and Vietnam war veteran Lenzy Lofton pro se appeals a March 11, 2019, Board of Veterans' Appeals decision that denied service connection for sleep apnea, to include as secondary to a persistent insomnia disorder. Record (R.) at 3-9. The appellant argues that the Board erred in failing to afford him the benefit of the doubt in the denying his claim. Appellant's Informal Brief at 1-3. For the following reason, the Court will set aside the March 2019 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 Act of Mar. 23, 1792, ch. 11, 1 U.S. Stat. 243 (1792) (repealed in part and amended by Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (1793)).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.

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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 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).

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[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. Air Force from February 1954 to February 1980 as a security supervisor and a security police superintendent. R. at 3443 (DD Form 214). For his service, he was awarded the Korean Service medal and Republic of Vietnam Campaign medal among many other commendations. *See id.*

[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).

IV.

In September 2015, the appellant was granted entitlement for service connection for persistent insomnia disorder, claimed as major depressive disorder (MDD) associated with dermatitis of the scalp. R. at 2169-78.

In January 2017, the appellant submitted a service-connection claim for sleep apnea secondary to insomnia/major depressive disorder. R. at 770-71. The appellant's private physician has provided an opinion stating that "obstructive sleep apnea worsen[s] [i]nsomnia, depression, and the opposite is also present." R. at 778. The same opinion also states "it is likely as not that the service connected insomnia/[major depression] exaggerates his sleep apnea conditions." R. at 780. The appellant has provided another opinion from this examiner that states, without explanation, that "[o]ne cannot say exactly how long this condition existed prior to the date of diagnosis or definitively state its cause. However, it is as likely as not that Lofton's service connected Insomnia/MDD exacerbates his Obstructive Sleep Apnea condition." R. at 483.

He has also submitted two medical articles, one discussing chronic insomnia, and the other addressing psychiatric disorders and insomnia. R. at 467-82. The appellant was provided a VA examination in February 2017, wherein the examiner provided a negative nexus opinion. R. at 549-54. In May 2018, the Board remanded the matter for a new examination after finding that the appellant's private examinations and the February 2017 VA examination "to be inadequate to fairly adjudicate the Veteran's claim, as all three opinions are conclusory and not supported by sufficient rationale." R. at 87. In September 2018, another VA examiner provided a negative nexus opinion. R. at 549-54, 42-47. VA sought an addendum to this opinion and in January 2019, a VA examiner concluded that

> obstructive sleep apnea is an anatomical condition in which the structures of the upper airway relax/prolapse during sleep. This results in the temporary occlusion of the airway. While some studies have shown that OSA and a diagnosis of chronic insomnia may co-exist (co-morbid) as noted in Association of Psychiatric Disorders and Sleep Apnea in a Large Cohort, Dr. A. Sharafkhaneh, et al.; and Comorbid Insomnia and Obstructive Sleep Apnea: Challenges for Clinical Practice and Research, Dr. F. S. Luyster, et al., however, there is no credible medical evidence of a causative link. OSA is not caused by or aggravated by chronic/persistent insomnia.

R. at 35.

V.

In March 2019, the Board denied service connection for sleep apnea, to include as secondary to the appellant's service-connected persistent insomnia disorder. R. at 3-9. The Board first found that the appellant's private physician's statements were of little probative value because the favorable nexus opinions were not supported by a rationale. R. at 6. The Board relied on February 2017, September 2018, and January 2019 VA opinions to deny the appellant's claim. R. at 7. The Board stated:

> [T]he January 2019 VA examiner specifically addressed the medical journal articles provided by the Veteran, which suggested a link between sleep apnea and insomnia. In those articles, the January 2019 VA examiner noted that while the underlying studies have shown that obstructive sleep apnea and chronic insomnia may co-exist, there was no credible medical evidence of a causative link between the two conditions. Further, the January 2019 VA examiner explained that obstructive sleep apnea is an anatomical condition in which the structures of the upper airway relax or prolapse during sleep, which results in the temporary occlusion of the airway. Based on those findings, the January 2019 VA examiner concluded that the Veteran's obstructive sleep apnea was not caused by or aggravated by his service-connected persistent insomnia disorder. As the February 2017, September 2018, and January 2019 VA opinions are based on reasoned analyses, including reference to medical literature, and consideration of the Veteran's complete medical history as well as his contentions, the Boards concludes that these opinions, collectively, provide more persuasive evidence concerning the etiology of the Veteran's obstructive sleep apnea. Accordingly, the Board finds that service connection for the Veteran's sleep apnea on a secondary basis is also not warranted.

R. at 7. This appeal ensued.

VI.

"The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant." 38 U.S.C. § 5107(b).

"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 provided an adequate statement of reasons or bases for its treatment of all evidence, except for the February 2017 VA examination report. 38 U.S.C. § 7104(d)(1). The Board addressed all favorable evidence submitted by the appellant and clearly explained its reasons for rejecting each piece of evidence. *See* R. at 6-7; *see also 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). The Board first noted that, although the appellant had submitted two favorable medical opinions, neither contained a rationale for the conclusion that the appellant's service-connected sleep troubles exacerbated his sleep apnea. R. at 6. Additionally, to the extent the appellant has submitted medical articles, the Board relied on the January 2019 VA examiner's rationale that explained that these articles evidenced that although people often have both psychiatric conditions, including depression and sleep apnea at the same time, the articles do not conclude that there is a causative relationship between these conditions. R. at 7. It is Board's duty to weigh the evidence, *see Washington v. Nicholson*, 19 Vet.App. 362, 367-68 (2005), and the Board provided an adequate statement of reasons or bases for its rejection of the appellant's favorable evidence and its reliance on the January 2019 VA examination, 38 U.S.C. § 7104(d)(1).

However, the Court concludes that the Board provided an inadequate statement of reasons or bases for relying on the February 2017 VA examination. 38 U.S.C. § 7104(d)(1). In May 2017, the Board found this opinion inadequate because it was "conclusory and not supported by sufficient rationale." R. at 87. Yet, in the decision on appeal the Board relied on the same opinion, finding that it was "based on [a] reasoned [analysis]." R. at 7. These findings are contradictory and the Board did not otherwise explain its reliance on this examination in the decision on appeal. Remand is required for the Board to provide an adequate statement of reasons or bases regarding the February 2017 VA examination. 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). Based on today's holding, the Court notes that the appellant is likely going to have to submit *additional* favorable medical evidence that includes a link between the appellant's service-connected sleep problems and a well-explained rationale for making this connection. *See Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 304 (2008) (concluding that a medical opinion is not entitled to any weight "if it contains only data and conclusions"). 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.

Based on the foregoing, the March 11, 2019, Board decision is SET ASIDE and the matter is REMANDED for readjudication.

DATED: May 14, 2020

Copies to:

Lenzo Lofton

VA General Counsel (027)