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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-5699

CYNTHIA A. DUNN, 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*: Persian Gulf War veteran Cynthia A. Dunn appeals through counsel that part of a July 12, 2018, Board of Veterans' Appeals decision that found that new and material evidence had not been submitted to reopen a service-connection claim for a hiatal hernia and denied service connection for obstructive sleep apnea (OSA). Record (R.) at 4-16[1]. The appellant argues that Board erred by (1) ignoring a June 2005 hiatal hernia diagnosis when the Board found that new and material evidence had not been submitted to reopen the hiatal hernia claim; (2) failing to ensure that the duty to assist was satisfied when it relied on an inadequate VA examination to deny which her hiatal hernia and failing to address missing treatment records; and (3) failing to remand the appellant's OSA claim as inextricably intertwined with the remanded breathing-problems claim. Appellant's Brief at 12. The Secretary concedes that a remand of the hiatal hernia claim is warranted because the Board overlooked a current diagnosis of the conditions; however, the Secretary contends that the remainder of the decision on appeal should be affirmed. Secretary's

[1] [1] The Board also remanded appellant's breathing-problems claim, to include allergic rhinitis. This matter is not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997).

Brief at 9-12. For the following reasons, the Court will set aside that part of the July 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 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[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.*

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.

[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).

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.

The appellant served on active duty in the U.S. Army from October 1988 to April 1995 as a Fire Control Systems Repairer. R. at 706 (DD Form 214). She has reported that, she was exposed to smoke from oil fires and tent theaters, cigarette smoke, diesel and other petroleum fumes, burning thrash and feces fumes, nerve gas, and dust storms during her tour of duty in the Persian Gulf. R. at 724-38.

IV.

In September 2005, appellant filed for service-connected benefits for a hiatal hernia. R at 708-17. In February 2006, the regional office denied this claim because it found that the appellant did not have a current hiatal hernia diagnosis. R. at 667. The appellant did not appeal this decision and it became final.

In July 2009 she sought to reopen the hiatal hernia claim, and submitted new evidence, including STRs and postservice treatment records. R at 659, 590-657. One of the post service

[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).

treatment records included a June 2005 hiatal hernia diagnosis from her private doctor, Dr. Mark Cummings. R. at 634.

In December 2009, appellant filed a service-connection claim for OSA. R. at 467-68. In December 2012, a VA examiner noted that the appellant had been diagnosed with OSA. R. at 417. The examiner opined that while VA considers snoring a symptom of OSA, the appellant's pharyngitis, multiple upper respiratory illnesses, and snoring were not "congruent with a diagnosis of sleep apnea"; and that "[o]bjective diagnostic testing is necessary because the clinical features of OSA are nonspecific and the diagnostic accuracy of clinical impression alone is poor." R. at 418. The examiner did not opine on whether the appellant's breathing problems, including pharyngitis, upper respiratory illnesses, and snoring, aggravated her OSA. *See* R. at 415-18.

The appellant attended a decision review officer (DRO) hearing in September 2013, and testified that she had difficulty sleeping, that she wakes up irritable and not feeling rested, that she was often congested, and that these difficulties started in service. R. at 327-28, 336. The appellant added that her treating physician informed her that her OSA is related to her sinus condition because when her sinuses get blocked, she cannot breathe. R. at 339. The appellant's husband also testified in front of the DRO that appellant has snored since he met her in 1993 (while the appellant was in service), that her snoring had worsened over the years. R. at 328-29.

V.

In July 2018, the Board denied the appellant's claim to reopen the claim of entitlement to service connection for a hiatal hernia, denied service connection for OSA, and reopened and remanded the claim of entitlement to service connection for breathing problems to include allergic rhinitis. R. at 4-16. The Board found that the evidence submitted by the appellant in relation to her hiatal hernia claim, in particular, her June 2007 and May 2009 treatment records, were new but not material because they failed to show an actual diagnosis of a hiatal hernia by a medical professional. R. at 10. The Board also found that while the appellant had a current diagnosis of OSA, there was no evidence it was service related because there were no in-service complaints or treatment for OSA or any in-service symptoms related to OSA in service, and that the appellant was not diagnosed or treated until June 2010. The December 2012 VA examiner's opinion was found to be the most probative evidence of record. R. at 12-14.

VI.

Section 3.156(a), title 38, Code of Federal Regulations, provides:

> A claimant may reopen a finally adjudicated legacy claim by submitting new and material evidence. New evidence is evidence not previously part of the actual record before agency adjudicators. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibly of substantiating the claim.

38 C.F.R. § 3.156(a) (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.). An adequate statement of reasons or bases includes accounting for and providing the reasons for its rejection of any material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996).

VII.

The Court agrees with the parties that the Board erred by failing to address favorable June 2006 hiatal hernia diagnosis from her personal doctor, Dr. Mark Cummings. *See id.* In February 2006, the RO denied the appellant's claim because she lacked a current diagnosis of a hiatal hernia. R. at 667. The diagnosis from Dr. Cummings seems directly related to the reason this case was denied, and the Board erred in failing to address this evidence when finding that the appellant failed to submit new and material evidence. *See* 38 C.F.R. § 3.156. Remand is required for the Board to address this favorable evidence. 38 U.S.C. § 7104(d)(1); *see also Caluza*, 7 Vet.App. at 506.

The Court also concludes that the Board provided an inadequate statement of reasons or bases for failing to remand the appellant's sleep disorder claim along with breathing problems claims as inextricably intertwined. *See* 38 U.S.C. § 7104(d)(1). *See Harris v. Derwinski*, 1

Vet.App. 180, 183 (1991) (holding that where a decision on one issue may have a "significant impact" upon another, the two claims are inextricably intertwined), *overruled on other grounds by Tyrues v. Shinseki*, 23 Vet.App. 166 (2009) (en banc), *aff'd*, 631 F.3d 1380, 1383 (Fed. Cir. 2011), *vacated and remanded for reconsideration*, 132 S. Ct. 75 (2011), *modified*, 26 Vet.App. 31 (2012). The appellant submitted documents and testimony recounting her difficulty sleeping, dating back to her years in service. The Board relied on the December 2012 VA examiner's opinion that the appellant's snoring was not a symptom of OSA, but the examiner never addressed whether the appellant's breathing problems, including sinus issues and snoring, aggravated her OSA. *See* R. at 415-18. The appellant has stated that her doctor informed her that sleep apnea and sinus blockage were related. It is unclear why the adjudication of the appellant's breathing problems claim would not have a significant impact on the adjudication of the appellant's OSA claim. Remand is required for the Board to provide an adequate statement of reasons or bases as to whether the appellant's OSA and her breathing problems are inextricably intertwined. 38 U.S.C. § 7104(d)(1).

Because the Court is remanding the appellant's claims, it will not address the appellant's remaining arguments. *See Dunn v. West*, 11 Vet.App. 462, 467 (1998). The appellant may also present, and the Board must consider, any additional evidence and arguments on remand. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). On remand, if the appellant would like VA to obtain additional records, *see* Appellant's Brief at 17-18, the Board should also obtain any additional medical records necessary in evaluating appellant's OSA claims. *See* 38 U.S.C. § 5103A. 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, those parts of the July 12, 2018, Board decision on appeal are SET ASIDE and the matters are REMANDED for readjudication.

DATED: May 14, 2020

Copies to:

Glenn R. Bergmann, Esq.

VA General Counsel (027)