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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-2658

GARY M. LAMBERT, 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 Gary M. Lambert appeals, through counsel, that part of a December 20, 2018, Board of Veterans' Appeals decision that denied him service connection for tinnitus.[1] Record (R.) at 5-10. The appellant argues that the Board erred by (1) relying on an inadequate medical examination; and (2) providing an inadequate statement of reasons or bases. Appellant's Brief at 3-6. For the following reason, the Court will set aside that part of the December 2018 Board decision on appeal and remand the matter for further development and 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'

[1] The Board remanded claims of gastroesophageal reflux disease and erectile dysfunction, including both as secondary to an acquired psychiatric disorder. R. at 5. These claims are therefore not before the Board. *See Hampton v. Gober*, 10 Vet.App. 481, 483 (1997). The Board also denied the appellant service connection for post-traumatic stress disorder (PTSD), R. at 5, but on April 6, 2019, the Board issued an order that granted the appellant service connection for PTSD, depressive disorder, and an anxiety disorder. Appellant's Brief at 1-2; Secretary's Brief at 2. This portion of the decision is not appealed and the Court deems it abandoned. *See Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc) (holding that, where an appellant abandons an issue or claim, the Court will not address it).

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 a circuit court determination favorable to a claimant 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

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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 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 June 1964 to June 1967 as a flight operations coordinator, and performed duties as a gunner. R. at 1239 (DD Form 214), 1202. The appellant served during the Vietnam War and earned several accolades for meritorious service, including the Republic of Vietnam Campaign Medal. *Id*.

IV.

In May 2011, the appellant filed a claim for disability benefits for tinnitus, which he alleged he began to experience in 2009. R. at 1268-77.

In August 2011, the appellant underwent a VA examination. R. at 1195-1205. The examiner noted that the appellant served as a gunner with a helmet being the only ear protection. R. at 1204-05. The examiner noted the appellant did not undergo a separation audiogram, "only a whisper voice test, which is not a reliable indicator of the presence or absence of [hearing loss]." *Id*. The examiner noted that the appellant's hearing loss "well exceeds norms for [hearing loss] due to aging, with a configuration consistent with noise exposure." *Id*. The examiner diagnosed the appellant with tinnitus and noted that the appellant had "reported significant military noise exposure," but because the appellant had alleged he began experiencing tinnitus only 2 years earlier, but post-service "occupational noise exposure [working for an airline] for many years, [with] ear protection," and because there was no "valid separation audio[logical examination]," the examiner was "unable to determine without speculation whether the current [hearing loss] and tinnitus began as a result of military noise exposure." *Id*.

V.

In December 2018, the Board denied the appellant's claim for service connection for tinnitus. R. at 8. The Board conceded in-service acoustic trauma, but noted that the August 2011 VA examiner "could not offer an opinion on the etiology of the tinnitus without resorting speculation given the competing acoustic traumas." *Id*. The Board acknowledged the appellant's evidence of medical literature that supported the development of delayed onset tinnitus, but the Board denied the claim because it found that "the evidence shows two sources of remote acoustic trauma, and evidence indicating delayed onset of tinnitus is possible. Nothing makes one trauma more likely a cause than the other; the VA examiner looked to the separation testing as such an

indicator." *Id*. The Board found no equipoise because there was no evidence of a nexus between the appellant's tinnitus and conceded in-service acoustic trauma. *Id*. 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).

VII.

The Court concludes that the Board erred by failing to return the August 2011 VA examination report for clarification. *See* 38 C.F.R. § 4.2. The examiner stated that she could not offer an opinion without resorting to speculation because the appellant's separation examination did not include any hearing tests. Yet, the appellant has stated that his tinnitus began in 2009. R. at 1268, 1204-05. It is unclear why an opinion could not be rendered based on a July 1967 audiological test. Remand is required for the Board to return the August 2011 VA examination for clarification. *See* 38 C.F.R. § 4.2.

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, the Court will SET ASIDE that part of the December 20, 2018, Board decision on appeal and REMAND the matter for further development and readjudication.

DATED: May 15, 2020

Copies to:

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