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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 18-6827

THOMAS C. GRAHAM, 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*: U.S. Army veteran Thomas C. Graham, through counsel, appeals an August 16, 2018, Board of Veterans' Appeals decision denying service connection for (1) a lumbar spine disability, (2) cataracts, (3) a cardiovascular disability, and (4) prostate gland hypertrophy. Record (R.) at 4-16. The appellant argues that (1) the Board erred in failing to ensure that VA satisfied its statutory duty to assist, and (2) failed to provide an adequate statement of reasons or bases for its decision. Appellant's Brief at 4-10. For the following reason the Court will set aside that part of the Board's August 2018 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 Act of Mar. 23, 1792, ch. 11, 1 U.S. Stat. 243 (1792) (repealed in part and amended by Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (1793)).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[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*.

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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 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.

[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).

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[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 honorably on active duty in the U.S. Army from November 1956 to November 1959 as an air defense missile fire control crewman. R. at 2136 (DD Form 214).

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

[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 August 2002, the National Personnel Records Center (NPRC) informed VA that it could not provide the appellant's service records, including any records that may have verified exposure to radiation, because the records were destroyed in a fire. R. at 1772.

In February 2003, the appellant filed for service-connected benefits based on a heart condition, cataracts, prostate gland hypertrophy, and a back condition. R. at 1749-50.

In an April 2006 radiation risk exposure sheet, the appellant stated that he was exposed to ionizing and microwave radiation in service because of his job as a radar technician. R. at 2099.

In January 2007, the appellant appeared before the Board. R. at 1257-1305. During his Board hearing, the appellant's representative stated: "I'd like to pose an alternate theory," and began discussing the appellant's handling of missile fuel and toxic chemicals without protective equipment while the appellant worked on the radar. R. at 1274-76.

In January 2011, the appellant underwent a VA examination. R. at 673-84. During the examination, he reported carrying radioactive material in the pockets of his jumpsuit for 4 to 5 days at a time. R. at 673.

In October 2015, the U.S. Army Radiation Dosimetry Branch reported that they were unable to locate any records of exposure to ionizing radiation for the appellant. R. at 187.

In November 2015, the appellant submitted a statement in support of claim. R. at 161-62. The appellant alleged that he "spent 28 days in Ft. Bills, Texas 10 hours per day and 28 days in New Mexico with clean-up and transfer of radiated material." R. at 161. He also alleged that he had "spent 14 days in Aberdeen, [Maryland] proving (missile) grounds fire involving [r]adiated [m]aterial." R. at 162. The appellant provided his own estimates of exposure to radiation alleging that, in total, he was exposed to 93 rems of radiation. R. at 162.

In March 2016, the Department of the Army Veterans' Radiation Exposure Program at the Army Public Health Center provided VA with a report after evaluating the appellant's records. R. at 143-45. The report states:

> In the early 1960s, the U.S. Army Environmental Hygiene Agency conducted a study of the x-ray radiation emitted from the Nike-Hercules Guided Missile Systems and determined that it is highly improbabl[e] that personnel working around this equipment could have received a radiation dose greater than 5 millisievert per year . . . . and that an individual would not have received a dose greater than 0.02 [millisievert] in any one hour of continuous occupancy of the area adjacent to the equipment. Based on an exposure period of 3 years, it is unlikely

> that Mr. Graham received a radiation dose greater than 15.0 [milliseverts] (1.5 rem) from his work with radar systems.

R. at 144.

In June 2016, the director of the Compensation Service requested a "Radiation Review Under 38 C.F.R. § 3.311," from the Under Secretary for Health. R. at 133. The director wrote:

> Please review the available records and prepare a dose estimate, to the extent feasible, based on available methodologies. Upon preparation of a dose estimate, please provide an opinion whether it is likely, unlikely, or as likely as not that the Veteran's [claimed conditions] resulted from exposure to radiation in service."

R. at 133.

In November 2016, the director of the Post 9/11 Era Environmental Health Program (EHP director) responded to the Compensation service's director, reviewed the appellant's records, and provided a dose estimate pursuant to 38 C.F.R. § 3.311(a)(2)(iii). R. at 131. The EHP director acknowledged the appellant's work as a missile crewmember and estimated his total ionizing radiation dose as 1.5 rems. R. at 131. The EHP director noted that the appellant's conditions were not diseases listed under 38 C.F.R. § 3.309(d), and that the appellant had not participated in a "radiation-risk activity" as defined in §3.309(d)(3)(ii). R. at 131. He then opined that it was unlikely that the appellant's claimed conditions "were caused by exposure to ionizing radiation during military service." R. at 131.

In December 2016, the Under Secretary for Benefits provided an advisory opinion pursuant to 38 C.F.R. § 3.311(c). R. at 132. She found "no reasonable possibility that the Veteran's [claimed conditions] can be attributed to ionizing radiation exposure while in military service." R. at 132.

V.

In its August 2018 decision, the Board conceded that the appellant was exposed to radiation during active duty service. R. at 4. The Board then determined that the appellant did not participate in a radiation-risk activity as defined by 38 C.F.R. § 3.309(d)(3)(ii) and therefore presumptive service connection was not warranted. R. at 12. The Board then continued to evaluate the appellant's claim pursuant to 38 C.F.R. § 3.311. R. at 12. The Board found that the claims had been properly developed as required by § 3.311, affording the November 2016 dose estimate from the EHP director high probative value in reaching the conclusion that "[b]ased on the competent medical evidence pursuant to that development, the Board finds that a preponderance of the

evidence is against finding that the Veteran's [claimed conditions] were due to his exposure to ionizing radiation." R. at 12. The Board also determined that service connection was not "the result of a disease or injury other than the alleged exposure to ionizing radiation," in part because, "the Veteran has not contended that these conditions are due to such." R. at 14.

VI.

"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.). This is especially so in a case where the service medical records are presumed destroyed; in such a case, the BVA's obligation to explain its findings is heightened.

"[T]he Board's statement of reasons or bases must account for the evidence which it finds to be persuasive or unpersuasive, analyze the credibility and probative value of all material evidence submitted by and on behalf of a claimant, and provide the reasons for its rejection of any such evidence." *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995) *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996). Where the appellant's service records are presumed destroyed, the Board's "obligation to explain its findings and conclusions . . . is heightened." *O'Hare v. Derwinski*, 1 Vet.App. 365, 367 (1991).

VII.

The Court concludes that the Board failed to address favorable evidence when it denied the veteran's claims. *See Caluza*, 7 Vet.App. at 506. The appellant has stated that he often carried radioactive materials in his pocket and was directly exposed to radioactive materials while he did cleanup at Aberdeen Proving Grounds. R. at 161-62, 673. Given that the appellant's service records were presumed destroyed, it was particularly important for the Board to address this evidence. *See O'Hare*, 1 Vet.App. at 367. The November 2016 and December 2016 opinions are solely based on radiation exposure related to the appellant's MOS. *See* R. at 144, 133. Remand is required for the Board to provide an adequate statement of reasons or bases for its determinations.

The Court also concludes that the Board erred by failing to address a theory of service connection raised by the appellant. *Robinson v. Peake*, 21 Vet. App. 545, 552 (2008). During the appellant's January 2007 Board hearing, the appellant's representative stated "I'd like to pose an alternate theory," and asserting that while the appellant worked on radar, he handled missile fuel and toxic chemicals without protective equipment. R. at 1274-76. Yet, the Board did not address this theory of service connection when it denied the appellant's claims. Remand of the matters on appeal is also required for the Board to address this theory of service connection. *See Robinson,* 21 Vet.App. at 545.

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). 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, that part of the Board's August 16, 2018, decision on appeal is SET ASIDE and the matters are REMANDED for readjudication.

DATED: May 15, 2020

Copies to:

Ashley C. Gautreau, Esq.

VA General Counsel (027)