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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-0688

CHRISMA L. BROCK, APPELLANT,

v.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before LANCE, *Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

LANCE, *Judge*: The appellant, Chrisma L. Brock, through counsel, appeals a December 9, 2014, Board of Veterans' Appeals (Board) decision that denied entitlement to a disability rating greater than 30% for service-connected headaches for the period from July 1, 2009, to January 15, 2013. Record (R). at 1-16. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. For the reasons that follow, the Court will vacate the December 9, 2014, decision and remand the matter for further proceedings consistent with this decision.

I. FACTS

The appellant served in the U.S. Army from June 14, 2002, to November 19, 2003, including service in Iraq; she was granted an early discharge for parenthood. R. at 1163.

Immediately prior to her separation from service, she submitted a claim for entitlement to service connection for, inter alia, tension headaches, R. at 1205-14, which the Winston-Salem, North Carolina, VA regional office (RO) granted in a February 2004 decision, assigning a 10% disability rating effective November 20, 2003. R. at 1140-43, 1152-56.

In May 2008, the appellant submitted a claim for an increased disability rating for her service-connected tension headaches. R. at 865-66. In a February 2009 decision, the RO denied entitlement to a disability rating greater than 10%. R. at 683-89, 691-97. She filed a Notice of Disagreement in March 2009, R. at 639-42, and perfected her appeal in May 2010, R. at 475. Following a December 2012 Board remand, R. at 393-419, and a January 2013 VA compensation and pension (C&P) examination, R. at 322-25, the RO denied a disability rating greater than 10% for the period prior to July 1, 2009, but granted a 30% disability rating from July 1, 2009, to January 15, 2013, and a 50% disability rating as of January 16, 2013, R. at 307. Thereafter, in February 2014, the Board granted a 30% rating for the period through June 30, 2009, but denied a rating greater than 30% from July 1, 2009, to January 15, 2013, and a rating greater than 50% as of January 16, 2013. R. at 17-41. The appellant appealed to the Court and, in July 2014, the Court granted a joint motion for remand (JMR). R. at 164-69, 170. While the appellant's appeal was pending at the Court, the RO implemented the February 2014 Board's grant of benefits for the period through June 30, 2009, and assigned a 30% disability evaluation as of May 19, 2008, the date of her increased disability rating claim. R. at 232-37, 242-47.

On December 9, 2014, the Board issued the decision on appeal. R. at 1-16. In it, the Board denied entitlement to a disability rating greater than 30% for service-connected headaches for the period from July 1, 2009, to January 15, 2013. *Id.* This appeal followed.

II. ANALYSIS

The appellant argues, *inter alia*, that the Board erred when it determined that VA had complied with the remand instructions contained in the July 2014 JMR. Appellant's Brief (Br.) at 9-12; Reply Br. at 1-7. Specifically, she contends that the Board failed to address the entire time period on appeal prior to January 16, 2013, and also failed to adequately discuss whether symptoms she reported at the January 2013 C&P examination supported an increased disability rating prior to that date. Appellant's Br. at 9-12.

In the July 2014 JMR, the parties agreed that the Board provided an inadequate statement of reasons or bases for its "finding that [the a]ppellant's headaches did not more nearly approximate the criteria for a 50% disability rating for the period prior to January 16, 2013." R. at 165. The Court granted the parties' JMR and vacated and remanded the Board's decision "to the extent that

it denied entitlement to a rating in excess of 30% prior to January 16, 2013, for headaches." R. at 170. Moreover, in February 2014, the Board granted benefits for the period through June 30, 2009, R. at 17-41, and the RO assigned a 30% disability rating as of May 19, 2008, R. at 232-37, 242-47. However, despite the language in the Court's July 2014 order vacating and remanding the appellant's headache disability for the period prior to January 16, 2013, the Board limited the time period on appeal to "July 1, 2009, to January 15, 2013," R. at 2.

The Secretary concedes that "the Board overlooked that the parties specified that the issue on remand was entitlement to a rating in excess of 30[%] prior to January 16, 2013, which period necessarily includes the period prior to July 1, 2009," and that "[t]he Board thus erred in unduly narrowing the rating period." Secretary's Br. at 5. The Secretary, however, contends that the error was not prejudicial, as the Board discussed the evidence pertaining to the period prior to July 1, 2009. *Id.* The Court disagrees. As the Secretary astutely notes, "[w]ords have meaning," *id.* at 18, and the Board erroneously framed the issue on appeal as "[e]ntitlement to a rating in excess of 30[%] for service-connected headaches for the period from July 1, 2009, to January 15, 2013," R. at 2. As the decision reads, it is not clear whether the Board considered *all* of the evidence from the period prior to July 1, 2009, and remand is, therefore, necessary. *See Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) (holding "that the evaluation and weighing of the evidence are factual determinations committed to the factfinder—in this case, the Board"); *Washington v. Nicholson*, 19 Vet.App. 362, 367-68 (2005) (noting that it is the Board's duty, as factfinder, to assess the credibility and probative weight of all relevant evidence); *cf.* 38 U.S.C. § 7261(b)(2) (requiring the Court to "take due account of the rule of prejudicial error").

Moreover, effective dates for increased ratings are based, in part, on when it is factually "ascertainable that an increase in disability had occurred." 38 U.S.C. § 5110(b). Here, the January 2013 C&P examination report states that the appellant experienced "prostrating attacks of migraine headache pain" "more frequently than once per month" "*over the last several months.*" R. at 324 (emphasis added). Under DC 8100, a 50% disability rating is awarded for migraines "[w]ith very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability." 38 C.F.R. § 4.124a, DC 8100 (2015). The Board's failure to discuss whether the findings in the January 2013 C&P examination report made it "ascertainable that an increase in disability had occurred" prior to the date of that examination frustrates the Court's review, and its

statement of reasons or bases is therefore inadequate. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). The Court will, therefore, vacate and remand the Board's decision.

In light of this outcome, the Court will not address the appellant's remaining arguments. *See Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009) (holding that "the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion"). On remand, the appellant is free to submit additional evidence and argument, including the arguments raised in her briefs to this Court, in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order), and the Board must consider any such evidence or argument submitted. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Board shall proceed expeditiously, in accordance with 38 U.S.C. §§ 5109B and 7112 (requiring Secretary to provide for "expeditious treatment" of claims remanded by Board or Court).

III. CONCLUSION

After consideration of the appellant's and the Secretary's briefs, and a review of the record, the Board's December 9, 2014, decision is VACATED and the matter is REMANDED to the Board for further proceedings consistent with this decision.

DATED: June 7, 2016

Copies to:

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