BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF
WILLIE S. JOHNSON

[redacted]

DOCKET NO. 13-00 895) DATE *August 10, 2016*
) *TDV*
)

On appeal from the
Department of Veterans Affairs Regional Office in Roanoke, Virginia

THE ISSUE

Entitlement to an initial rating higher than 30 percent for mixed headaches.

REPRESENTATION

Appellant represented by: Virginia Department of Veterans Services

ATTORNEY FOR THE BOARD

W.T. Snyder, Counsel

INTRODUCTION

The Veteran served on active duty with the U.S. Marine Corps from March 1987 to May 1994.

IN THE APPEAL OF
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This appeal to the Board of Veterans' Appeals (Board) arose from an October 2010 rating decision of the Department of Veterans' Affairs (VA) Regional Office (RO) in Winston-Salem, North Carolina which—in pertinent part, granted service connection and assigned an initial 30-percent rating, effective in September 2010. A December 2010 rating decision granted an earlier effective date of August 30, 2010. After receipt of his Notice of Disagreement (01/07/2011 VBMS), the Veteran specifically instructed the RO to limit his appeal to the issue of the initial rating of his headaches disability. (02/23/2011 VBMS-VA 21-4138). The RO in Roanoke, Virginia currently exercises jurisdiction over the claims file.

The Veteran requested a Board hearing at the RO via video conference, which was scheduled for June 17, 2016. (05/10/2016 VBMS-Correspondence). The Veteran, however, failed to appear for his hearing, and he has not requested that it be rescheduled. Hence, his request for a hearing is deemed to have been withdrawn. *See* 38 C.F.R. § 20.702(d) (2015).

FINDING OF FACT

The Veteran's headaches manifest as characteristically prostrating that occur on average once a month. Very frequent completely prostrating and prolonged attacks have not manifested.

CONCLUSION OF LAW

The requirements for an initial evaluation higher than 30 percent for mixed headaches, migraine-tension, are not met. 38 U.S.C.A. §§ 1155, 5103, 5103A, 5107 (West 2014); 38 C.F.R. §§ 3.159, 3.321(b)(1), 4.1, 4.3, 4.10, 4.124a, Diagnostic Code (DC) 8100 (2015).

IN THE APPEAL OF [redacted]
WILLIE S. JOHNSON

REASONS AND BASES FOR FINDINGS AND CONCLUSION

Veterans Claims Assistance Act of 2000 (VCAA)

As service connection, an initial rating, and an effective date have been assigned, the notice requirements of 38 U.S.C.A. § 5103(a) have been met. *Hartman v. Nicholson*, 483 F.3d 1311 (Fed. Cir. 2007). Consequently, discussion of VA's compliance with VCAA notice requirements would serve no useful purpose.

VA has fulfilled its duty to assist the Veteran in obtaining identified and available evidence needed to substantiate a claim, and as warranted by law, affording VA examinations. *See* 38 C.F.R. § 3.159(c). The Veteran's VA and non-VA treatment records are in the claims file. Neither he nor his representative asserts that there are additional records to obtain. In sum, there is no evidence of any VA error in notifying or assisting him that affects the fairness of this adjudication. Hence, the Board may address the merits of the appeal without prejudice to the Veteran.

Applicable Legal Requirements

Disability ratings are determined by applying the criteria set forth in the VA Schedule for Rating Disabilities and are intended to represent the average impairment of earning capacity resulting from disability. 38 U.S.C.A. § 1155; 38 C.F.R. § 4.1.

Disabilities must be reviewed in relation to their history. 38 C.F.R. § 4.1. VA must also interpret reports of examination in light of the whole recorded history, reconciling the various reports into a consistent picture so that the current rating may accurately reflect the elements of disability. 38 C.F.R. § 4.2.

VA must resolve any reasonable doubt regarding the degree of disability in favor of the claimant. 38 U.S.C.A. § 5107(b); 38 C.F.R. § 4.3. Where there is a question as to which of two ratings apply, VA will assign the higher of the two where the disability picture more nearly approximates the criteria for the next higher rating. Otherwise, the lower rating will be assigned. 38 C.F.R. § 4.7; *see* 38 C.F.R. § 4.21.

The Board will consider entitlement to staged ratings to compensate for times since the effective date for grant of service connection when either disability may have been more severe than at other times during the course of the claim on appeal. *See Fenderson v. West*, 12 Vet. App. 119 (1999).

VA must also evaluate functional impairment on the basis of the effects of the disability upon the person's ordinary activity. 38 C.F.R. § 4.10; *see Schafrath v. Derwinski*, 1 Vet. App. 589 (1991).

Discussion

The Veteran's mixed headache disability has been evaluated under 38 C.F.R. § 4.124a, DC 8100. Those criteria provide for a 30-percent rating for migraine headaches with characteristic prostrating attacks occurring on an average once a month over the last several months. A 50-percent rating is provided for migraine headaches with very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability.

Significantly, the use of the conjunctive "and" in a statutory provision means that all of the conditions listed in the provision must be met. *See Melson v. Derwinski*, 1 Vet. App. 334 (1991); *cf. Johnson v. Brown*, 7 Vet. App. 95 (1994) (holding that only one disjunctive "or" requirement must be met in order for an increased rating to be assigned). Here, because of the successive nature of the rating criteria, such that the evaluation for each higher disability rating includes the criteria of each lower disability rating (at least what could be considered most of them), each of the criteria listed in the 50-percent rating must be met in order to warrant such a rating. *See Tatum v. Shinseki*, 23 Vet. App. 152, 156 (2009). The Board notes that § 4.7 is not applicable to DCs that apply successive rating criteria, such as DC 8100. It is successive because the criteria of each lower disability rating is included in the higher disability rating.

Neither the rating criteria nor the Court Of Appeals For Veterans Claims (Court) has defined "prostrating." By way of reference, according to WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 1080 (3rd Ed. (1986)), "prostration" is

defined as "utter physical exhaustion or helplessness." A very similar definition is found in DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1554 (31st Ed. (2007)), in which "prostration" is defined as "extreme exhaustion or powerlessness."

In *Pierce*, the Court noted preliminarily that "[n]owhere in the DC is 'inadaptability' defined, nor can a definition be found elsewhere in title 38 of the [C.F.R.]." *Pierce v. Principi*, 18 Vet. App. 440, 444-45 (2004). The CAVC observed, however, that "nothing in DC 8100 requires that the claimant be completely unable to work in order to qualify for a 50% rating." *Id*. at 446. Indeed, the CAVC reasoned, if the claimant were unemployable, he would be eligible for a total disability evaluation based on individual unemployability rather than just a 50% rating. *Id*. Further in *Pierce*, the Secretary acknowledged that the phrase "productive of severe economic inadaptability" in DC 8100 should be construed as either "producing" or "capable of producing" economic inadaptability. *Id*.

Lay evidence is competent to describe the frequency, severity, and duration of migraine headaches, including whether they are severe enough to cause prostration. See 38 C.F.R. § 3.159(a)(2); *Layno*, 6 Vet. App. at 471. Therefore, the Board finds that the Veteran's statements about his headache symptoms constitute competent evidence for rating purposes.

The October 2010 VA examination report reflects the Veteran's reported history of the onset of headaches during his active service for which he obtained relief with ingestion of Ibuprofen. He reported further that they worsened over time and currently were very bad. The Veteran described his usual as mild, dull and achy, and on average of 2-4/10 intensity, but they could last for weeks. Occasionally they worsened to where they affected his sleep, but they responded to medication, and he was able to sleep. Approximately 3 times a month, however, he experienced pressure-like headaches on both sides of his head in the temples; they affected his vision; were of 7/10 intensity; and they lasted from minutes to hours. He reported that when experienced those headaches, he had to stop what he was doing after he took his medication. The Veteran stated that over the prior 12 months, they had occurred 2 to 3 times a month, and most were prostrating.

Physical examination revealed no abnormalities. The examiner noted that the Veteran's neurological examination was normal. He diagnosed mixed headaches, migraine-tension. The Veteran reported that he was laid off from his last full-time job of fork lift operator some 5 to 10 years earlier. At the time of the examination he worked part time; but he reported that during prostrating headaches he was unable to work 3 times a month. (10/27/2010 VBMS-VA Examination) Subsequent to issuance of the October 2010 rating decision, the Veteran submitted private records dated from 2005 to 2007 when he worked full time. (12/02/2010 VBMS-Medical Treatment-Non-Government Facility) Those records reflect that the provider noted treatment of the Veteran for headaches since 2005. The physician noted that the Veteran had to avail himself of the Family Medical Leave Act (FMLA) in 2006 and 2007. *Id.*, p. 1. A July 2007 notation reflects that the physician estimated that severe headaches would require the Veteran to leave work no more than once a week, but that frequency was expected to decrease with treatment. *Id.*, pp. 4-5.

The Board finds that the findings at the October 2010 examination show that the Veteran's headaches were not completely prostrating on a very frequent basis. While three times a month may be deemed frequent, the Board finds it does not equal very frequent. Further, the Veteran described his most intense headaches as prostrating rather than completely prostrating. The preponderance of the evidence also shows that the Veteran's reported intense headaches were not prolonged. Hence, the Board finds that the headaches more nearly approximated the assigned 30-percent rating as of the October 2010 examination. The private records reflect the Veteran's disability picture some three years prior to the effective date of his grant of service connection, but that history is roughly equivalent to what he reported at the 2010 examination. The Board understands that the Veteran has had to avail himself of FMLA; however, his 30 percent rating is meant to compensate him for the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civil occupations. 38 C.F.R. § 4.1

An August 2012 lay statement of one the Veteran's friends reflects that there were times that the Veteran's headaches were of sufficient intensity to where they

interfered with his ability to enjoy the company of his family. (08/28/2012 VBMS-Buddy Statement)

In his NOD, the Veteran asserted that he wanted compensation for all of the years that he had dealt with his headaches, as he was not aware that he could seek assistance from VA. (01/07/2011 VBMS-Notice of Disagreement) The Board acknowledges the Veteran's history, but VA compensation is based on the effective date of an award, not necessarily how many years one have had a disability. *See* 38 C.F.R. § 3.400.

The September 2012 VA examination report (09/28/2012 VBMS) reflects that the Veteran reported he was employed full time as a corrections officer. He reported further that the frequency of his headaches had decreased since the prior couple of months and, he was not certain if it was related to the fact that he liked his new job. He denied aura or premonition related to his headaches. The headaches that he experienced resolved in 15 minutes if his girlfriend massaged his temples. The Veteran reported that he had not experienced a headache over the prior three weeks, which was the longest he had ever gone without a headache. Usually he had a headache every 6 to 21 days which had throbbing pressure and were non-radiating. They were of 7/10 intensity; he sometimes saw stars; and they usually lasted 15 to 45 minutes. The Veteran reported that his "regular headaches" involved pain all over his head and lasted 1 to 2 hours.

The examiner noted that the Veteran did not have characteristic prostrating migraine headaches. He had on average prostrating attacks more than once a month but not very frequent prostrating and prolonged attacks of migraine or non-migraine headache pain. The examiner noted further that the Veteran's non-migraine headaches were not prostrating. The examiner opined that the Veteran's headaches did not impact his ability to work.

On his VA Form 9 (01/09/2013 VBMS), the Veteran asserted that, although he was able to function, his headaches still rendered him highly impaired. He asserted further, that even with the decreased frequency noted in the 2012 examination report, he still was highly impaired. The Board finds that the findings on clinical

examination at the September 2012 examination refute the Veteran's assertions. The examiner opined that the Veteran's headaches were not very frequently prostrating or prolonged. Indeed, the 2012 VA examination report reflects that the headaches would last 15-45 minutes and the Board does not find this to be prolonged. The absence of prostrating or prolonged headaches, let alone both, falls short of the maximum, 50-percent, rating. Hence, the Board finds that the preponderance of the evidence shows the Veteran's headaches to have more nearly approximated the assigned the 30-percent rating throughout the entire rating period. 38 C.F.R. §§ 4.1, 4.10, 4.124a, DC 8100.

As discussed above, the Veteran has not asserted any symptoms not described or contemplated by the rating criteria. Hence, his headaches do not manifest with an exceptional disability picture. Hence, referral for consideration of a higher rating on an extraschedular basis is not indicated. *See Thun v. Peake*, 22 Vet. App. 111 (2008); 38 C.F.R. § 3.321(b)(1). The Veteran asserted the loss of potential wages due to his disability, but the Court has specifically noted that potential loss of income is not a factor in assessing for extraschedular consideration. Indeed, the Court has stated that evidence of a claimant's lost income, for example, due to time missed from work because of a service-connected disability, might be relevant, after the RO or Board has found the rating schedule to be inadequate, in the second or third steps of the analysis described above, but unequivocally is not part of the threshold inquiry into the adequacy of the rating schedule. *Thun*, 22 Vet. App. at 117 n.3.

The Board notes that a February 2013 rating decision granted service connection for PTSD and assigned a 70-percent rating, effective October 21, 2011. From that date forward, the Veteran's total combined rating is 80 percent. (02/06/2013 VBMS-Rating Decision-Codesheet) There is no evidence that either disability aggravates the other. Hence, the Board finds that the 80-percent total rating contemplates the Veteran's disability picture. *See Johnson v. McDonald*, 762 F.3d 1362, 1365-66 (Fed. Cir. 2015).

Occupational impairment, or entitlement to a total disability rating based on individual unemployability (TDIU), is deemed to be part of an increased rating

claim. *See Rice v. Shinseki*, 22 Vet. App. 447 (2009). The Veteran asserted in his NOD that he has not obtained full-time employment because of his history of having used the FMLA for his headaches. As noted earlier, the October 2010 examination report noted that the Veteran worked part time. The September 2012 examination report reflects that the Veteran's part-time employment between 2008 and July 10, 2011 was assisting his girlfriend children's day care. From that date forward, the Veteran has been employed full time.

Prior to October 21, 2011, the Veteran's total rating was 30 percent. For the period September 2010 to July 2011, there is no evidence that the Veteran's headaches rendered him unable to obtain and maintain substantially gainful employment. *See* 38 C.F.R. §§ 3.340, 3.341. Hence, the Board finds no plausible basis for referral for consideration of unemployability on an extraschedular basis. *See Bowling v. Principi*, 15 Vet. App. 1 (2001); *see also* 38 C.F.R. § 4.16(b). As noted, the Veteran has worked full time since July 10, 2011. Hence, there is no factual basis for a TDIU. 38 C.F.R. §§ 3.340, 3.341, 4.16. Indeed, there is no cogent evidence of unemployability due to his service-connected headaches. *Comer v. Peake*, 552 F.3d 1362, 1367 (Fed. Cir. 2009). Based on the foregoing, the Board finds that the matter of TDIU has not been raised.

ORDER

Entitlement to an initial rating higher than 30 percent for mixed headaches is denied.

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PAUL SORISIO
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (BVA or Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. We will return your file to your local VA office to implement the BVA's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. None of these things is mutually exclusive - you can do all five things at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court ***before*** you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

How long do I have to start my appeal to the court? You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you,* you will have another 120 days from the date the BVA decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time*. Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

How do I appeal to the United States Court of Appeals for Veterans Claims? Send your Notice of Appeal to the Court at:

Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: http://www.uscourts.cavc.gov, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office.

How do I file a motion for reconsideration? You can file a motion asking the BVA to reconsider any part of this decision by writing a letter to the BVA clearly explaining why you believe that the BVA committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that such letter be as specific as possible. A general statement of dissatisfaction with the BVA decision or some other aspect of the VA claims adjudication process will not suffice. If the BVA has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified will not be considered. Send your letter to:

Director, Management, Planning and Analysis (014)
Board of Veterans' Appeals
810 Vermont Avenue, NW
Washington, DC 20420

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to vacate? You can file a motion asking the BVA to vacate any part of this decision by writing a letter to the BVA stating why you believe you were denied due process of law during your appeal. *See* 38 C.F.R. 20.904. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error? You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400 -- 20.1411, and *seek help from a qualified representative before filing such a motion.* See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

How do I reopen my claim? You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. *See* 38 C.F.R. 3.156(a).

Can someone represent me in my appeal? Yes. You can always represent yourself in any claim before VA, including the BVA, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: http://www.va.gov/vso/. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before the VA, you can get information on how to do so at the Court's website at: http://www.uscourts.cavc.gov. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: http://www.vetsprobono.org, mail@vetsprobono.org, or (855) 446-9678.

Do I have to pay an attorney or agent to represent me? An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. *See* 38 C.F.R. 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

Fee for VA home and small business loan cases: An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

Filing of Fee Agreements: In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to the Secretary at the following address:

Office of the General Counsel (022D)
810 Vermont Avenue, NW
Washington, DC 20420

The Office of General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of General Counsel. *See* 38 C.F.R. 14.636(i); 14.637(d).