

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-4288

DEIDRE G. JONES, APPELLANT,

V.

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

Before SCHOELEN, *Judge*.

MEMORANDUM DECISION

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

SCHOELEN, *Judge*: The appellant, Deidre G. Jones, through counsel, appeals an August 28, 2015, Board of Veterans' Appeals (Board) decision in which the Board denied an initial disability rating in excess of 30% prior to April 9, 2015, and in excess of 50% as of April 9, 2015, for migraine headaches; an initial disability rating in excess of 10% prior to April 9, 2015, and in excess of 30% as of April 9, 2015, for carpal tunnel syndrome affecting the right side; and an initial disability rating in excess of 10% prior to April 9, 2015, and in excess of 20% as of April 9, 2015, for carpal tunnel syndrome affecting the left side. Record of Proceedings (R.) at 1-22. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will vacate the decision and remand the matter for further proceedings consistent with this decision.

I. BACKGROUND

The appellant has service in the U.S. Coast Guard ending in January 2005.¹ R. at 1857. In August 2004, the appellant filed a disability compensation claim for, among other conditions, bilateral carpal tunnel syndrome and headaches. R. at 5992-95.

In October 2005, the VA regional office (RO) granted service connection for the appellant's bilateral carpal tunnel syndrome and headaches and assigned noncompensable ratings for the conditions. R. at 5765-78. The following month, the appellant filed a Notice of Disagreement. R. at 5755. In December 2006, the RO issued a Statement of the Case (SOC) that increased the appellant's disability rating for bilateral carpal tunnel syndrome to 10% for each arm and 30% for her headaches, with an effective date of December 15, 2005. R. at 5583-5622.

In January 2007, the appellant perfected her appeal to the Board. R. at 5564-65. In March 2009, the appellant filed an application for increased compensation based on unemployability. R. at 5450-52. In December 2009, the appellant submitted a statement detailing that she had migraines at least 1 time per week, with each migraine lasting as long as 3 or 4 days. R. at 5390.

A November 2010 Board decision remanded the appellant's carpal tunnel and headache claims. R. at 4966. In April 2011, the appellant underwent a VA neurology examination where the appellant reported daily headaches that lasted a few hours to a few days and were "not prostrating." R. at 4134-35. The examiner also noted that the appellant had 2 to 3 headaches per week with a severity of 10/10 lasting 1 to 3 days. R. at 4135. The examiner further noted that the appellant's more severe headaches were 50% prostrating, requiring her to lie down and caused vomiting if she attempted to eat. *Id.* Subsequently, a December 2012 Board decision remanded the appellant's headache claim. R. at 3648-53.

In March 2013, the appellant underwent a VA examination for her headaches. R. at 1844-46. The appellant stated that her headaches had worsened in severity and had become more frequent after an automobile accident that occurred in November 2012. R. at 1844. A September 2013 Board

¹ The appellant's DD Form 214 is not contained in the record of proceedings, and the appellant asserts that the DD Form 214 is not contained in her file. Appellant's Brief (Br.) at 1. Additionally, various documents in the record of proceedings differ as to whether the appellant's service began in 1988 or 1998. R. at 3, 5765, 5992. The appellant's dates of service are not at issue, and any discrepancies do not preclude review of the Board's decision.

decision again remanded the appellant's headache claims, but denied a rating in excess of 10% for the left and right carpal tunnel syndrome claims. R. at 1855-1903. The appellant appealed the denied portion of the Board decision to the Court, and in March 2014, pursuant to a joint motion for partial remand (JMPR), the Court remanded the increased rating claims for bilateral carpal tunnel syndrome to the Board. R. at 807-14. The parties agreed that the Board provided inadequate reasons and bases for why it chose to rate the appellant's left and right carpal tunnel syndrome under Diagnostic Code (DC) 8515 without considering whether other DCs would have been appropriate for rating purposes. R. at 811.

In December 2014, the Board remanded the appellant's headache and bilateral carpal tunnel syndrome claims for further development. In April 2015, the appellant underwent a peripheral nerves examination. R. at 65-69. The examiner noted that the appellant's bilateral carpal tunnel syndrome symptoms had worsened, and diagnosed her with moderate incomplete paralysis of the left and right medial nerve. R. at 65, 68. The appellant also underwent an examination for her headaches. R. at 70-71. The examiner noted that the appellant had "very prostrating and prolonged attacks of migraines/non-migraine pain productive of severe economic inadaptability" and that she was "unable to work due to [the] frequency of severe headaches." R. at 71.

In April 2015, the RO increased the appellant's disability rating for headaches to 50%, effective April 9, 2015. R. at 37. The RO also increased the appellant's disability rating for her right carpal tunnel syndrome to 30% and for her left carpal tunnel syndrome to 20%, both effective April 9, 2015. *Id.* In the August 2015 Board decision on appeal, the Board denied earlier effective dates for the appellant's headache and carpal tunnel syndrome claims. R. at 1-21. This appeal followed.

II. ANALYSIS

A. Carpal Tunnel Syndrome

A remand by the Court "confers on the veteran . . . , as a matter of law, the right to compliance with the remand orders," and the Board itself errs when it fails to ensure compliance with the terms of such a remand. *Stegall v. West*, 11 Vet.App. 268, 271 (1998). Although the Secretary is required to comply with remand orders, it is substantial compliance, not absolute compliance, that is required. *See Dymont v. West*, 13 Vet.App. 141, 146-47 (1999) (holding that there was no *Stegall*

violation when the examiner made the ultimate determination required by the Board's remand, because such determination "more than substantially complied with the Board's remand order"); *Evans v. West*, 12 Vet.App. 22, 31 (1998) (holding that remand was not warranted because the Secretary substantially complied with the Board's remand order).

The Board's determination that VA has satisfied the duty to assist is reviewed under the "clearly erroneous" standard of review. *Hyatt v. Nicholson*, 21 Vet.App. 390, 395 (2007). "A factual finding 'is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

The appellant argues that the Board clearly erred when it failed to substantially comply with the March 2014 JMPR's terms that required the Board to consider whether the appellant's bilateral carpal tunnel syndrome should have been rated under other DCs, including DC 8512. Appellant's Br. at 1. The Secretary argues that the Board substantially complied with the JMPR because the Board stated that "no other [DC] provides for a higher rating" and the April 2011 and April 2015 examiners identified only the median nerve as the nerve affected by the appellant's carpal tunnel syndrome. Secretary's Br. at 13-15.

In the decision on appeal, the Board stated that it had "considered whether any other applicable rating criteria may enable a higher rating," but that after review, "no other [DC] provides for a higher rating" because the April 2011 and April 2015 examinations noted "only the median nerve as being affected by the [appellant's] . . . carpal tunnel syndrome." R. at 17. In her principal brief, the appellant highlights the above Board analysis, but asserts that the Board reached its conclusion "without discussing [DC] 8512, as specifically noted in the JMPR as being a potentially applicable [DC]." Appellant's Br. at 11 (citing R. at 17, 812-13). The Court agrees with the appellant's contention. Although the Board decision purportedly addresses the applicability of DCs other than DC 8515, there is no actual analysis of other DCs, including DC 8512, which the March 2014 JMPR specifically mentioned as a potentially applicable DC. Additionally, the Board's statement that only the median nerves affected the appellant's carpal tunnel syndrome does not explain adequately why other DCs may not result in a higher disability rating, especially considering

that the appellant's carpal tunnel syndrome was rated by analogy. Accordingly, the Board's finding that it had substantially complied with the March 2014 JMPR and Court remand order was clearly erroneous, and the Court will remand the matter in order for the Board to comply with the Court's March 2014 remand order. *See Stegall, supra*; *see also Dymment v. West*, 13 Vet.App. 141, 147 (1999) (Board must ensure substantial compliance with remand orders); *Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

B. Headaches

Before deciding a claim, the Board is required to consider all relevant evidence of record and to consider and discuss in its decision all "potentially applicable" provisions of law and regulation. *Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991); *see* 38 U.S.C. §7104(a); *Weaver v. Principi*, 14 Vet.App. 301, 302 (2001) (per curiam order). Additionally, the Board is required to include in its decision a written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). The statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate informed review in this Court. *See Allday*, 7 Vet.App. at 527; *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *See Caluza v. Brown*, 7 Vet.App. 494, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *Gabrielson v. Brown*, 7 Vet.App. 36, 39-40 (1994).

Under DC 8100, a 30% disability rating is assigned for headaches resulting in prostrating attacks occurring on average once a month over the last several months. 38 C.F.R. § 4.124a, DC 8100 (2016). A 50% disability rating is assigned for headaches resulting in "very frequent completely prostrating prolonged attacks productive of severe economic inadaptability." *Id.*

Here, the appellant argues that the Board erred in denying her a disability rating for headaches in excess of 30% prior to November 2012. Appellant's Br. at 16. Specifically, the appellant argues that the Board failed to provide an adequate statement of reasons or bases as to why

the appellant's migraine headaches were not "very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability." *Id.* at 18-19 (quoting 38 C.F.R. § 4.124a, DC 8100). The Secretary responds that the Board provided an adequate statement of reasons or bases. Secretary's Br. at 16. The Court agrees with the appellant.

In the decision on appeal, the Board noted the appellant's April 2011 VA neurology examination, where the appellant reported that daily headaches last hours to a few days that were "not prostrating." R. at 8. The Board also noted that examination's findings that the appellant had "two to three headaches per week of a severity of 10/10 lasting one to three days that were 50% prostrating, requiring her to lie down and causing vomiting if she eats." *Id.* Although the Board addressed part of the April 2011 examination, it did not provide any analysis of the evidence that the appellant's migraines required her to lie down and caused her to vomit when she ate. R. at 11. Failure to comment on such positive evidence frustrates judicial review. *See Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (Board must provide an adequate statement of reasons or bases "for its rejection of any material evidence favorable to the claimant"); *see also Caluza, supra*.

Further, the Board stated that "the examiners' assessments of the [appellant's] disability do not indicate that the headaches were productive of severe economic inadaptability, which is also required for a higher 50[%] rating." R. at 11. The Board highlighted those assessments, stating that "the first examiner noted that the headaches would only result in increased tardiness and absenteeism. The second examiner noted that the [appellant] would be able to hold a sedentary job." *Id.* The Board did not acknowledge that the phrase "productive of severe economic inadaptability" in DC 8100 is construed as either "producing" or "capable of producing" economic inadaptability. *Pierce v. Principi*, 18 Vet.App. 440, 445-46 (2004). The Board did not apply the "capable of producing" standard laid out in *Pierce* to the evidence concerning the appellant's tardiness and absenteeism.

Accordingly, because the Board's statement of reasons or bases is inadequate to facilitate judicial review, the court will remand the matter, *see Tucker, supra*, and the Board should carefully address the above issues, as well as discuss the applicability of 38 C.F.R. §§ 4.3 (2016) (reasonable doubt resolved in favor of claimant), 4.7 (2016) (higher possible evaluation applies "if disability picture more nearly approximates the criteria for that rating[; o]therwise, the lower rating will be

assigned"), and 4.21 (2016) (all the elements specified in a disability grade need not necessarily be found although "coordination of rating with impairment of function will, however, be expected in all instances"). Failure to "acknowledge and consider" these potentially relevant regulations would be error. *Schafraath*, 1 Vet.App. at 593.

Given this disposition, the Court will not, at this time, address the other arguments and issues raised by the appellant. *See Best v. Principi*, 15 Vet.App. 18, 20 (2001) (per curiam order) (holding that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him"). On remand, the appellant is free to submit additional evidence and argument on the remanded matters, and the Board is required to consider any such relevant evidence and argument. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002) (stating that, on remand, the Board must consider additional evidence and argument in assessing entitlement to benefit sought); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court has held that "[a] remand is meant to entail a critical examination of the justification for the decision." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). The Board must proceed expeditiously, in accordance with 38 U.S.C. § 7112 (requiring Secretary to provide for "expeditious treatment" of claims remanded by the Court).

III. CONCLUSION

After consideration of the appellant's and the Secretary's pleadings, and a review of the record, the Board's August 28, 2015, decision is VACATED and the matter is REMANDED to the Board for further proceedings consistent with this decision.

DATED: December 29, 2016

Copies to:

Robert V. Chisholm, Esq.

VA General Counsel (027)