Vet.App. No. 16-3808

IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS

WILLIE S. JOHNSON,
Appellant,

v.

DAVID J. SHULKIN, M.D.,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

MEGHAN FLANZ
Interim General Counsel

MARY ANN FLYNN
Chief Counsel

SELKET N. COTTLE
Deputy Chief Counsel

SARAH E. WOLF
Appellate Attorney
Office of the General Counsel (027I)
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420
(202) 632-6727

Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CITATIONS TO THE RECORD BEFORE THE AGENCY

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

WILLIE S. JOHNSON,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet.App. No. 16-3808
	)	
DAVID J. SHULKIN, M.D., Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

I. ISSUE PRESENTED

Whether the Court should affirm the August 10, 2016, decision of the Board of Veterans' Appeals (Board), which denied a rating in excess of 30% for mixed headaches.

II. STATEMENT OF THE CASE

A. JURISDICTIONAL STATEMENT

The Court has exclusive jurisdiction to review final decisions of the Board under 38 U.S.C. § 7252(a).

B. NATURE OF THE CASE

On August 10, 2016, the Board issued a decision denying entitlement to an initial rating higher than 30% for mixed headaches. Appellant, Mr. Willie S. Johnson, filed a timely appeal of the Board's decision on November 15, 2016.

C. STATEMENT OF RELEVANT FACTS

Appellant served on active duty in the U.S. Marine Corps from March 1987 to May 1994. [Record Before the Agency (R.) at 81]. In August 2010, he filed a claim for disability compensation with the Department of Veterans Affairs (VA) for, *inter alia*, headaches. [R. at 551-60]. In October 2010, Appellant submitted for a VA examination. [R. at 523-29]. He described pressure headaches on both sides of his head that affect his vision. [R. at 523]. As to the severity of his headaches, he stated that they are a "7/10 in intensity, lasting minutes to hours if taken Vicodin," and occurring around three times a month. *Id.* He reported that his headaches are "prostrating" and that he needs to stop doing what he is doing. *Id.* Similarly, the examiner noted that Appellant has prostrating headaches approximately three times per month, during which he is unable to work, and that these headaches typically "last hours." [R. at 525].

In an October 27, 2010, rating decision, a VA Regional Office (RO) awarded Appellant service connection for mixed headaches and assigned a 30% rating, effective September 3, 2010. [R. at 517-22]. In a December 18, 2010, rating decision, the RO awarded him an earlier effective date of August 30, 2010. [R. at 496-500]. In January 2011, Appellant filed a Notice of Disagreement with

the rating decision. [R. at 489]. He stated that since learning of the Family and Medical Leave Act (FMLA) three years prior, he has relied on the FMLA to allow him to leave work when his headaches are severe. *Id.*

Appellant underwent a second VA examination in September 2012. [R. at 416-21]. The examiner noted Appellant's history of headaches, including symptoms of throbbing pressure on both sides of his head and occasionally seeing stars. [R. at 417]. Appellant reported that his typical headaches occur once every 6-21 days, are a 7/10 in intensity, and usually last 15-45 minutes. *Id.* The examiner indicated that Appellant did not have very frequent prostrating and prolonged attacks of headache pain and noted that Appellant is working and that his headache condition does not impact his ability to work. [R. at 417, 420-21].

On November 15, 2012, the RO issued a Statement of the Case (SOC) denying a rating in excess of 30% because of a lack of evidence that his headaches were productive of severe economic inadaptability. [R. at 372-84]. In his December 2012 appeal to the Board, Appellant stated that he has "frequent prostrating migraine attacks each month" that have required him to take advantage of the FMLA. [R. at 368]. In a March 10, 2016, Supplemental Statement of the Case (SSOC), the RO continued the 30% rating. [R. at 78-79].

On August 10, 2016, the Board issued the decision on appeal, denying a rating in excess of 30% for Appellant's headaches. [R. at 1-13]. The Board found that Appellant did not experience very frequently completely prostrating and prolonged attacks. [R. at 3]. The Board also determined that referral for

extraschedular consideration for either a higher rating or a total disability rating based on individual unemployability (TDIU) was not warranted. [R. at 9-10]. This appeal followed.

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's August 10, 2016, decision because the Board's determination that a rating in excess of 30% was not warranted is supported by an adequate statement of reasons or bases. The Board considered the relevant evidence and adequately explained why Appellant's headaches were not "very frequent," "completely prostrating," or "prolonged attacks," which are required for a 50% rating. *See Pierce v. Principi*, 18 Vet.App. 440, 445 (2004) (describing the Board's requirement to discuss the terms applicable in a headaches claim). Moreover, Appellant has not met his burden of demonstrating prejudicial error.

IV. ARGUMENT

The Board provided an adequate statement of reasons or bases for its denial of a disability rating in excess of 30% for mixed headaches.

Appellant asserts that he is entitled to a 50% disability rating for his headache disability. Appellant's Brief (App. Br.) at 5-11. The Board's determination of the appropriate degree of disability is a finding of fact subject to the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4). *Johnston v. Brown*, 10 Vet.App. 80, 84 (1997). Under this standard, if there is a plausible basis in the record for the Board's factual determinations, the Court

cannot reverse them. *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990); *Hood v. Shinseki*, 23 Vet.App. 295, 299 (2009) (the Court "will not disturb a Board finding unless, based on the record as a whole, the Court is convinced that the finding is incorrect."). The Court may not substitute its judgment for the factual determinations of the Board on issues of material fact merely because the Court would have decided those issues differently in the first instance. *Gilbert*, 1 Vet.App. at 52. In addition, the Board is required to support its determinations of fact and law with a written statement of reasons or bases that is understandable by the claimant and facilitates review by the Court. *See* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

Appellant's headache disability is rated under 38 C.F.R. § 4.124a, Diagnostic Code (DC) 8100. Under DC 8100, a 30% rating is warranted for migraines "with characteristic prostrating attacks occurring on average once a month over the last several months." 38 C.F.R. § 4.124(a), DC 8100. A 50% rating is warranted for migraines with "very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability." *Id.*

Here, the Board adequately explained its reasoning for its determination that Appellant was not entitled to a disability rating in excess of 30% for his headaches. The Board found: "[Appellant]'s headaches manifest as characteristically prostrating that occur on average once a month. Very frequent completely prostrating and prolonged attacks have not manifested." [R. at 3]. As to the severity and frequency of Appellant's headaches, the Board considered

the medical evidence, including the October 2010 and September 2012 VA examinations [R. at 523-29, 416-21], and concluded that his headaches "were not completely prostrating on a very frequent basis." [R. at 7-9]. The Board discussed the fact that at the October 2010 examination Appellant's reported headaches occurred three times a month—and acknowledged that "three times a month may be deemed frequent"—but found that "it does not equal very frequent." [R. at 7]. The Board also noted the evidence regarding the severity of Appellant's headaches, including lay statements from Appellant and his friend [R. at 7-8], but found that his headaches were not completely prostrating. [R. at 7, 9]. The Board articulated the standard for "prostration" as "utter physical exhaustion or helplessness, and "extreme exhaustion or powerlessness." [R. at 5-6 (quoting WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 1080 (3rd ed. (1986) and DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1554 (31st ed. (2007))]. In support of its determination on this element, the Board explained that Appellant described his headaches as prostrating instead of completely prostrating [R. at 7], and the September 2012 examiner opined that Appellant's headaches—both migraine and non-migraine—were not very frequently prostrating [R. at 9]; *see* [R. at 420 (416-21)].

Appellant's argument that the Board's statement of reasons or bases is inadequate because it did not discuss VA's M21-1 Compensation and Pension Manual (M21-1 Manual) is unpersuasive. Contrary to Appellant's assertion, the Board was not legally required to consider the M21-1 Manual. App. Br. at 8; *see*

DAV v. Sec'y of Veterans Affairs, 859 F.3d 1072, 1077 (Fed. Cir. 2017). The M21-1 Manual is a procedural manual and the Board is not bound by VA manuals. *See* 38 C.F.R. § 19.5. Recently, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) stated:

> The M21-1 Manual is binding on neither the agency nor tribunals. The Board of Veterans' Appeals ("Board") is bound only by "regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department." 38 U.S.C. § 7104(c). The M21-1 Manual falls under none of these categories.

DAV, 859 F.3d at 1077. Thus, Appellant's claim that 38 U.S.C. § 7104(c) dictates that the Board is bound by the M21-1 Manual is directly contradicted by the Federal Circuit's decision in *DAV*.

Aside from 38 U.S.C. § 7104(c), the only authority to which Appellant cites in support of his argument that the Board is bound by the M21-1 Manual is *Fugere v. Derwinski*, 1 Vet.App. 103, 108 (1990). App. Br. at 8-9. However, unlike *Fugere*, this case does not involve a manual provision that is "more than a procedural guideline." 1 Vet.App. at 107 (describing a provision in the M21-1 Manual that directed adjudicators to take a specific action). Instead, the provisions in question in Appellant's case are procedural in nature and meant to serve as a guide to adjudicators. *See* M21-1 Manual, pt. III, subpt. iv, ch. 4, § G.7; *see also Haas v. Peake*, 525 F.3d 1168, 1195-96 (Fed. Cir. 2008) (describing interpretive rules as those that represent VA's "reading of statutes

and rules rather than an attempt to make new law or modify existing law") (citation omitted); *Fournier v. Shinseki*, 23 Vet.App. 480, 487 (2010).

Although the M21-1 Manual's provision discussing the terminology pertaining to "very frequent" is favorable to Appellant, there is nothing in the record to suggest that the application of the Manual would have changed the Board's determination with respect to "completely prostrating and prolonged attacks." Put another way, assuming the Board erred in not discussing and applying the M21-1 Manual, any such error was harmless because applying the suggested interpretation of the terminology "prostrating" and "completely prostrating" would not have led to a different result. *See* 38 U.S.C. § 7261(b)(2) (providing that the Court is required to "take due account of the rule of prejudicial error"); *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009) (explaining that the burden of demonstrating prejudice normally falls upon the party attacking the agency's determination); *Mayfield v. Nicholson*, 19 Vet.App. 103, 116 (2005) (holding that "a demonstration by one party that an error did not affect the outcome of a case would establish that there was or could be no prejudice"), *rev'd in part by Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that appellant has the burden of demonstrating error), *aff'd,* 232 F.3d 908 (Fed. Cir. 2000). The M21-1 Manual defines "prostrating" as "causing extreme exhaustion, powerlessness, debilitation or incapacitation with substantial inability to engage in ordinary activities." M21-1 Manual, pt. III, subpt. iv, ch. 4, § G.7.b. This is almost identical

to the definition of "prostrating" used by the Board. *See* [R. at 5-6]. Before concluding that Appellant's headaches were not "completely prostrating," the Board noted the criteria for a 50% rating under DC 8100 required "completely prostrating" attacks and, as noted above, explained the meaning of "prostrating." [R. at 5-6]. Thus, when reading the Board's decision as a whole, it is clear that the Board understood the distinction between prostrating and completely prostrating attacks and that completely prostrating requires something more than a "substantial inability to engage in ordinary activities." M21-1 Manual, pt. III, subpt. iv, ch. 4, § G.7.b (describing "prostrating"); *see Johnson v. Shinseki*, 26 Vet.App. 237, 247 (2013) (en banc) ("A Board statement generally should be read as a whole."), *rev'd on other grounds by Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014); *Prickett v. Nicholson*, 20 Vet.App. 370, 375 (2006) (considering a Board statement "in the context of the Board's discussion as a whole"); *Janssen v. Principi*, 15 Vet.App. 370, 379 (2001) (rendering a decision on the Board's statement of reasons or bases "as a whole").

Moreover, the Board did not err in considering Appellant's description of his headaches as "prostrating." The Board found Appellant competent to describe his headache symptomatology and Appellant does not challenge this finding. [R. at 6]; c*ompare Layno v. Brown*, 6 Vet.App. 465, 469 (1994) (lay testimony is competent to establish the presence of observable symptomatology*), and Charles v. Principi*, 16 Vet.App. 370, 374 (2002) (finding appellant competent to testify as to symptomatology capable of lay observation),

with Clemons v. Shinseki, 23 Vet.App. 1, 4-5 (2009) (finding a veteran not competent to testify to his belief that he suffered from PTSD). Additionally, the Board did not limit its analysis to Appellant's description of his headaches as "prostrating" instead of "completely prostrating." While the Board did not specifically reference the October 2010 VA examiner's assessment that Appellant was "[u]nable to perform any task with prostrating headaches," [R. at 525], it did acknowledge that when Appellant experienced his most severe headaches, he was unable to work *and* had to "stop what he was doing." [R. at 6-7]. The Board also relied on the September 2012 VA opinion that Appellant did not have very frequent prostrating and prolonged attacks of headache pain, which also supports the Board's determination. *See* [R. at 8-9, 420 (416-21)]; *Gilbert*, 1 Vet.App. at 53. As the Board discussed, the September 2012 VA examiner opined that Appellant's headaches do not impact his ability to work. [R. at 421].

Finally, Appellant has failed to demonstrate error in the Board's determination that headaches lasting minutes to hours are not "prolonged." In coming to the conclusion that Appellant's headaches did not meet the required element of "prolonged attacks," the Board relied upon the evidence that as of October 2010, Appellant's headaches lasted "minutes to hours," [R. at 6], and by September 2012, his headaches lasted 15-45 minutes [R. at 9]. Contrary to Appellant's assertion, the Board did not fail to discuss Appellant's use of leave pursuant to the FMLA. *See* App. Br. at 9-11. Rather, the Board acknowledged

that Appellant took advantage of the FMLA yet still determined that his headaches were not prolonged. [R. at 7-9]. Appellant has failed to establish that his use of FMLA is material to the issue of "prolonged attacks," particularly where his statements regarding the use of FMLA speak to the frequency of his headaches, [R. at 368 (noting that the September 2012 examination recorded "the decreased frequency")], but provide no additional evidence regarding the duration of his headaches. [R. at 368, 489-90]; *see Hilkert*, 12 Vet.App. at 151; *see also Shinseki*, 556 U.S. at 409-10. The Board complied with its duty to weigh the lay and medical evidence of record, and it made factual findings in the first instance regarding the frequency, severity, and duration of Appellant's headaches. [R. at 6-9]. There is a plausible basis in the record as a whole for the Board's determination that Appellant's headaches more nearly approximate the 30% rating throughout the entire appeal period. [R. at 9]; *see* 38 C.F.R. § 4.7; *Gilbert*, 1 Vet.App. at 53. As such, the Board's decision is not clearly erroneous, and Appellant has failed to demonstrate error warranting remand.

V. CONCLUSION

In light of the foregoing, Appellee, David J. Shulkin, M.D., Secretary of Veterans Affairs, asks the Court to affirm the August 10, 2016, Board decision.

Respectfully submitted,

MEGHAN FLANZ
Interim General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Selket N. Cottle
SELKET N. COTTLE
Deputy Chief Counsel

Date: August 10, 2017

/s/ Sarah E. Wolf
SARAH E. WOLF
Appellate Attorney
Office of the General Counsel (027I)
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420
(202) 632-6727

Attorneys for the Appellee
Secretary of Veterans Affairs