United States Court of Appeals for Veterans Claims

Vet.App. No. 16-3808

WILLIE S. JOHNSON,

Appellant,

v.

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

Appellee.

REPLY BRIEF FOR APPELLANT

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PRELIMINARY STATEMENT

In his opening brief, Mr. Johnson demonstrated that the Court should vacate and remand the Board's August 10, 2016, decision because it violated 38 U.S.C. § 7104(d)(1). Specifically, he argued that the Board provided an inadequate statement of reasons or bases for why Mr. Johnson was not entitled to a disability rating greater than 30% for his headache disorder under 38 C.F.R. § 4.124a, Diagnostic Code (DC) 8100, because the Board did not address relevant legal provisions from VA's adjudication manual, the M21-1. Furthermore, the Board also did not adequately address the import of Mr. Johnson's testimony that he continued to take medical leave pursuant to the Family Medical Leave Act due to his headaches.

In response the Secretary argues for affirmance. In doing so he asserts (1) that the Board was not required to address the M21-1 because it is not binding pursuant to *DAV v. Sec'y of Veterans Affairs*, 859 F.3d 1072 (Fed. Cir. 2017), and (2) the Board adequately supported its determinations as to whether Mr. Johnson's headaches were "completely prostrating" and "prolonged." For the reasons that follow, the Court should reject the Secretary's arguments and remand the Board's decision.

ARGUMENT

I. *DAV v. Sec'y of Veterans Affairs* Does Not Excuse the Board from Its Failure to Address Relevant Portions of the M21-1

The Secretary's argument that the Board had no legal obligation to address the portions of the M21-1 that are applicable to evaluating headache disabilities under DC 8100 has no merit. The Secretary asserts:

> [T]he 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.

Secretary's Brief (Br). at 6-7 (emphasis added).

The Board's obligation to address the M21-1 derives from the Congressionally imposed requirement that the Board must provide an adequate statement of reasons or bases under 38 U.S.C. § 7104(d)(1). Under that statute, the Board is obligated to provide the reasons or bases for its findings and conclusions on all **material issues** of **law** and fact; that statement must be adequate to enable an appellant to understand the precise basis for the Board's decision, as well as to facilitate informed review by the Court. See 38 U.S.C. 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

It simply does not follow from the fact that the M21-1 provisions concerning DC 8100 may not be binding, that those provisions are not material. The provisions are material because the M21-1 contains the Secretary's interpretation of DC 8100. *See, e.g.*, *Haas v. Peake*, 525 F.3d 1168, 1186 (Fed. Cir. 2008) (stating that "we must look to the DVA's interpretation of its own regulation . . . . Generally, 'an agency's interpretation of its own regulations is controlling unless plainly erroneous or inconsistent with the

regulations being interpreted.'" (*quoting Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2346 (2007) (internal quotations omitted)). Thus, while the Board may conclude that it need not follow M21-1 provisions that it determines are plainly erroneous or inconsistent with the regulation, it must still address material M21-1 provisions.

The Board's obligation to address the M21-1 under 38 U.S.C. § 7104(d)(1) was not addressed by the Federal Circuit in *DAV*. In fact, § 7104(d)(1) was not cited anywhere in that decision. *See generally DAV*, 859 F.3d. at 1072-78. Instead, *DAV* focused on whether or not a change to the M21-1 concerning what qualifies as a chronic multi-symptom illness under 38 U.S.C. § 1117 should have been subjected to notice and comment rule making under the Administrative Procedure Act (APA). *Id*. In the course of reviewing that question, the Federal Circuit determined that the M21-1 is not binding on the Board. However, the fact that the Board has some discretion with respect to the M21-1, does not relieve it of its responsibility to address the Manual, just as it must address other material legal authority. Therefore, the Court should reject the Secretary's contention that the Board was free to ignore the M21-1 in this case.

II. The Secretary's Contention That the Board Provided An Adequate Statement of Reasons or Bases as to whether Mr. Johnson's Headaches Were Completely Prostrating and Prolonged is Without Merit.

The Secretary asserts that even if the M21-1 provisions at issue in this case were applicable, that the Board's findings concerning whether Mr. Johnson's headaches were "completely prostrating" and "prolonged" would not change and are adequately supported. This argument is without merit.

First, with respect to whether or not Mr. Johnson's condition is "completely prostrating," the Secretary asserts that "when reading the Board's decision as a whole, it is clear that the Board understood the distinction between prostrating and completely prostrating attacks." Secretary's Br. at 9-10. He then asserts that the Board could rely on Mr. Johnson's characterization of his headaches as prostrating instead of completely prostrating, because the veteran is competent to describe his symptoms. *Id*. Finally, the Secretary acknowledges that the Board did not address the October 2010 VA examiner's finding that Mr. Johnson was "[u]nable to perform any task with prostrating headaches," [R. at 525]," but suggests that it was sufficient for the Board to note that Mr. Johnson had to stop working during a headache. *Id*.

The Secretary's argument lacks merit because it fails to grapple with the Board's actual error. As demonstrated in Appellant's opening brief, the Board erred because it did not explain how Mr. Johnson's case did not fit the definition of "completely prostrating," (i.e essentially a total inability to engage in ordinary activities) given that the clinical results of the October 2010 examination showed he could not engage in "any task" during his headaches. Appellant's Br. at 9. The Secretary does not point to a single portion of the Board decision that provides such an explanation, and the Board's observation that Appellant would stop working does not address the examiner's finding that Mr. Johnson could not perform "any task."

Furthermore, the Board's reliance on Mr. Johnson's description of his condition as "prostrating," as opposed to "completely prostrating," in the October 2010 examination, borders on the absurd. Mr. Johnson is not a lawyer schooled in veterans' law. The Board

could not reasonably assume that Mr. Johnson was familiar with and intended to use the legal definition of "prostrating," especially in the face of medical evidence, including the examiner's finding that Mr. Johnson could not engage in **any task,** demonstrating that his condition was actually "completely prostrating." In the final analysis, the Board unreasonably dismissed the medical evidence of Mr. Johnson's actual symptoms and chose instead to rely on his lay statement omitting the word "completely" in describing his history. (R. at 7 (2-10)) ("the Veteran described his most intense headaches as prostrating rather than completely prostrating").

As for the issue of whether or not Mr. Johnson's headaches were prolonged, the Secretary argues that Board adequately considered Mr. Johnson's use of the Family Medical Leave Act (FMLA) because that evidence speaks only to the frequency of attacks, rather than duration. Secretary's Br. at 11. However, this is simply not the case. In his substantive appeal, Mr. Johnson stated:

> I have frequent prostrating migraine attacks each month. I have submitted evidence that shows my inability to adapt to the normal requirements of the workforce. *The time that I have to be out and take FMLA for my service connected headaches is not endearing to my employers, but rather is quite the opposite*.

(R. at 368) (emphasis added). The time taken out refers to a sum of time; this would be applicable to both frequency and duration. Specifically, if Mr. Johnson's headaches were only for short periods of time, there would be no basis for taking out a large amount of leave that would be upsetting to his employers. In addition, as noted in Appellant's opening brief, a person can only draw unpaid leave under the FMLA. 29 U.S.C. § 2601.

It stands to reason that no rationale individual would take unpaid leave unless the afflicting condition was "prolonged." Appellant's Br. at 11.

Despite the above, the Board never addressed Mr. Johnson's FMLA leave in any meaningful way. The Secretary cites to pages 7-9 of the Board decision; however, those pages (1) do not address the use of FMLA after 2010, (2) record that the October 2010 examiner noted its use, and (3) that FMLA apparently had no bearing because Mr. Johnson's assigned 30% rating was meant to compensate him for his average impairment. (R. at 7-9 (2-10)). The Board never addressed why use of the FMLA leave does not relate to the duration of Mr. Johnson's headaches and did not address that he continued to use FMLA after 2010. Therefore, the Secretary's assertion that Board adequately supported its findings concerning whether Mr. Johnson's headaches were "completely prostrating" and "prolonged" is without merit.

CONCLUSION

For the foregoing reasons, and the reasons stated in Appellant's opening brief, the Court should vacate and remand the Board's August 10, 2016, determination that Appellant is not entitled to a disability rating greater than 30% under DC 8100, with instructions to provide an adequate statement of reasons or bases that, among other things, addresses the relevant provisions of the M21-1 and the material evidence of record.

October 10, 2017

Respectfully Submitted,
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