

Not published

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 16-3808

WILLIE S. JOHNSON,

APPELLANT,

v.

DAVID J. SHULKIN, M.D.,
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

ORDER

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

U.S. Marine Corps veteran Willie S. Johnson appeals through counsel an August 10, 2016, decision of the Board of Veterans' Appeals (Board) that denied a disability rating in excess of 30% for his service-connected migraine headaches. The Board stated that "§ 4.7 is not applicable to DCs that apply successive rating criteria such as [38 C.F.R. § 4.124a, Diagnostic Code] DC 8100 [migraine headaches]. It is successive because the criteria of each lower disability rating is included in the higher disability rating." Record (R.) at 5.

In *Pierce v. Principi*, 18 Vet.App. 440 (2004), the Court stated that 38 C.F.R §§ 4.3 (benefit of the doubt standard), 4.7 (higher of two evaluations), and 4.21 (all requirements in a multi-criteria rating code need not be shown) applied to DC 8100 and remanded for an explanation of the interplay among those three regulations with respect to the rating under DC 8100. Later decisions of the Court indicated the existence of at least one DC, and perhaps a class of DCs, involving "successive rating criteria," to which 4.7 (and presumably 4.21) did not apply. See *Tatum v. Shinseki*, 23 Vet.App. 152, 155 (2009); *Camacho v. Nicholson*, 21 Vet.App. 360 (2007) (classifying the DC for diabetes as having successive rating criteria rendering § 4.7 inapplicable). The Board cited *Tatum* in declaring DC 8100 to be a successive rating DC.

The Court is aware of no precedential decision establishing that DC 8100 is a DC characterized by successive rating criteria. Accordingly, the case was assigned to a panel to provide binding precedent on the application of the concept of successive rating criteria to all DCs, resolving uncertainty with regard to DC 8100 in particular. Because the parties did not address this issue, the Court seeks supplemental briefing, which is to include discussion of the following questions:

- 1) What are the determinants of whether a DC involves successive rating criteria, such that an analysis of the interplay among §§ 4.3, 4.7, and 4.21 is not required to assign a rating under any given DC?

- 2) How do those determinants apply in the specific instance of DC 8100?
- 3) If the panel were to agree that DC 8100 has successive rating criteria, would that conclusion create a conflict with *Pierce* requiring an en banc decision to resolve?

This appeal will be scheduled for oral argument at the convenience of the Court. The parties should be prepared to address the issue that is the subject of this order as well as the other issues raised in the parties' briefs.

On consideration of the foregoing, it is

ORDERED that within 30 days of the date of this order, the parties will file supplemental briefing that discusses, but need not be limited to, the questions set forth above. It is further

ORDERED that the Clerk of Court will schedule oral argument in this case as regular business permits.

DATED: January 23, 2018

PER CURIAM.

Copies to:

Patrick Berkshire, Esq.

VA General Counsel (027)