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.

APPELLANT'S SUPPLEMENTAL BRIEF

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INTRODUCTION

The appellant, Willie S. Johnson, appeals the August 10, 2016 decision of the Board of Veterans' Appeals ("Board") that denied entitlement to a disability rating greater than 30 percent for mixed headaches. Record Before the Agency ("R.") at 3 (2-10). On December 19, 2017, after full briefing by the parties, this Court issued an Order referring this case to a panel. On January 23, 2018, the Court ordered the parties to submit supplemental briefs to address the following questions:

1) What are the determinants of whether a DC involves successive rating criteria, such that an analysis of the interplay between 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?

Pursuant to the Court's order, Mr. Johnson submits this supplemental brief.

ARGUMENT

I. OVERLAPPING OR CUMULATIVE CRITERIA BETWEEN HIGHER AND LOWER EVALUATIONS DETERMINE WHETHER A DIAGNOSTIC CODE INVOLVES SUCCESSIVE CRITERIA.

In its decision in *Tatum v. Shinseki*, 23 Vet. App. 152 (2009), this Court analyzed the rating criteria for hypothyroidism under 38 C.F.R. § 4.119, DC 7903. Then, as now, a ten percent rating required "fatigability, or; continuous medication required for control"; a thirty percent rating required "fatigability, constipation, and mental sluggishness"; and a 60 percent rating required "muscular weakness, mental disturbance, and weight gain." *Tatum*, 23 Vet. App. at 156.

The Court held that, because "a veteran could potentially establish *all* of the criteria required for either a 30% or a 60% disability rating, without establishing *any* of the criteria for a lesser disability rating," the criteria are not successive. *Tatum*, 23 Vet. App. at 156 (emphasis in original). The Court further held that where criteria are not successive, the Board should apply 38 C.F.R. § 4.7 and determine whether the veteran's "disability picture more nearly approximates the criteria required" for a higher rating, even if the veteran's symptoms do not satisfy each of the criteria enumerated for a particular rating. *Id*. (quoting section 4.7). To hold otherwise, the Court explained, would "eviscerate the meaning" of both section 4.7 and section 4.21.[1] *Id*.

Put differently, rating criteria *are* successive where the criteria for different rating percentages overlap or share the same criteria such that entitlement to a higher rating necessarily establishes entitlement to a lower rating precisely because of the overlap between the criteria. When criteria *are* successive, sections 4.3, 4.7, and 4.21 are *not* applicable, and therefore the Board is not required to discuss whether the "veteran's disability picture more nearly approximates the criteria" for a higher rating.

[1] 38 C.F.R. § 4.7 provides that "[w]here there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned. 38 C.F.R. § 4.21 provides that "[i]n view of the number of atypical instances it is not expected, especially with the more fully described disabilities, that all cases will show the findings specified. Findings sufficiently characteristic to identify the disease and the disability therefrom, and above all, coordination of rating with impairment of function, will, however, be expected in all instances." *See also* 38 C.F.R. § 4.3 ("When after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding the degree of disability such doubt will be resolved in favor of the claimant.").

The Court discussed an example of rating criteria that are successive in *Camacho v. Nicholson*, 21 Vet. App. 360 (2007). In that decision, the Court addressed whether the Board erred by failing to consider section 4.7 in determining the appropriate rating for diabetes mellitus ("diabetes") under 38 C.F.R. § 4.119, DC 7913. DC 7913 provides for a 20 percent rating where "the diabetes requires insulin or an oral hypoglycemic agent and a restricted diet." *Camacho*, 21 Vet. App. at 363. A 40 percent rating is warranted where "the diabetes requires insulin, restricted diet, and regulation of activities." *Id.* As explained above, because establishing entitlement to the 40 percent rating requires establishing entitlement to the 20 percent rating (*i.e.*, that the diabetes requires insulin and restricted diet), these criteria are successive. That is, a veteran could not establish entitlement to the higher rating without first establishing the criteria for the lower rating, because the higher rating requires the insulin and restricted diet that are also required for the lower rating. The criteria are therefore successive. *See Tatum*, 23 Vet. App. at 156.

This Court accordingly held that section 4.7 is not applicable with respect to DC 7913, and that, in order to establish a higher rating under that DC, a veteran is required to establish all of the criteria enumerated for the higher rating.[2] *Camacho*, 21 Vet. App. at

[2] To the extent that the Court appeared to emphasize the importance of the conjunctive "and" in Diagnostic Code 7913, *Camacho*, 21 Vet. App. at 366-67, the Court's later decision in *Tatum* makes clear that "and" is not dispositive with respect to whether criteria are successive, *Tatum*, 23 Vet. App. at 156. Where criteria are not successive, the "interplay" of sections 4.3, 4.7, and 4.21 does not require that a veteran satisfy all of the criteria enumerated for a rating notwithstanding a conjunctive "and" in the criteria. *See also Middleton v. Shinseki*, 727 F.3d 1172, 1178 (Fed. Cir. 2013) (confirming that "and" requires satisfaction of all criteria where the criteria are successive).

366. *See also Middleton v. Shinseki*, 727 F.3d 1172, 1788 (Fed Cir. 2013) (finding that DC 7913 involves successive criteria).

In sum, whether the criteria between two disability ratings overlap or are cumulative determines whether those criteria are successive. Where the criteria overlap such that a veteran cannot establish entitlement to the higher of two ratings without first establishing entitlement to the lower rating because the criteria are cumulative, the criteria are successive. *See Tatum*, 23 Vet. App. at 156. Where criteria are successive, as in the case of DC 7913 for diabetes, no analysis of the "interplay" between 38 C.F.R. §§ 4.3, 4.7, and 4.21 is necessary. *Id.*

II. IT IS REASONABLY DEBATABLE WHETHER THE CRITERIA UNDER 38 C.F.R. § 4.124a, DIAGNOSTIC CODE 8100, ARE WHOLLY SUCCESSIVE.

Diagnostic Code 8100 provides for:

- A 0 percent rating for migraine headaches with "less frequent attacks."
- A 10 percent rating for migraine headaches with "characteristic prostrating attacks averaging one in 2 months over last several months."
- A 30 percent rating for migraine headaches with "characteristic prostrating attacks occurring on an average once a month over last several months."
- A 50 percent rating for migraine headaches with "very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability."

38 C.F.R. § 4.124a, DC 8100.

As explained above, the criteria under DC 8100 are successive if establishing entitlement to a higher rating requires satisfaction of the criteria for the immediately preceding or lower rating. *See Tatum*, 23 Vet. App. at 156. In this regard, the criteria for ratings from 0 percent to 30 percent overlap and are successive. That is, the criteria for a

10 percent rating require attacks "averaging one in 2 months over last several months," which encompasses the "less frequent attacks," or something less than once in 2 months over the last several months, contemplated by the criteria for a noncompensable rating. Similarly, the criteria for a 30 percent rating are cumulative with those for a 10 percent rating, increasing the "one in 2 months" frequency required for the lower rating to "once a month" for the higher, which necessarily encompasses attacks at least once every two months. The criteria for ratings from 0 to 30 percent are therefore successive, and an analysis of the "interplay" of sections 4.3, 4.7, and 4.21 is not warranted as to those ratings.

With respect to the criteria for ratings from 30 percent to 50 percent rating, it is reasonably possible that these criteria are successive. The criteria for a 30 percent rating require "characteristic prostrating attacks occurring on an average once a month over last several months"; the criteria for a 50 percent rating require "very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability." It is possible that the criteria are not successive because the terms themselves are different. Had the Secretary intended the criteria between 30 and 50 percent to be successive, he could have made this clear by repeating the "characteristic prostrating attacks" language in the criteria for 10 and 30 percent in the criteria for the 50 percent rating.

On the other hand, to the extent that the "very frequent" attacks required for a 50 percent rating reflects attacks more often than the once-per-month frequency required for the 30 percent rating, the criteria may be successive because the "very frequent" attacks would necessarily occur at least one per month. Similarly, the "completely prostrating

attacks" required for a 50 percent rating may well be intended to encompass and exceed the "characteristic prostrating attacks" required for a 30 percent rating.

In the decision underlying the instant appeal, however, the Board did not address these questions. R. 2-13. That is, the Board did not address whether any of the criteria under DC 8100 are successive or whether sections 4.3, 4.7, and 4.21 are applicable when determining the appropriate rating under DC 8100. The circumstances of the appeal here are therefore analogous to the circumstances the Court confronted in *Pierce v. Principi*, 18 Vet. App. 440 (2004). In that decision, the Court concluded that where the Board fails to address sections 4.3, 4.7, and 4.21 in the context DC 8100, remand is the appropriate remedy for the Board to address the issue. *Pierce*, 18 Vet. App. at 445. In other words, the Court's decision in *Pierce* reflects the Court's binding judgment that it should not resolve these same questions here in the first instance.

Appellant wishes to emphasize that, as Mr. Johnson argued in his initial and reply briefs, vacating the Board's decision and remand of his claim for a higher rating under DC 8100 is required regardless of the resolution to the questions posed by this Court regarding sections 4.3, 4.7, and 4.21, and DC 8100. As Mr. Johnson argued, the Board failed to provide an adequate statement of reasons or bases for finding that he does not suffer from headaches "[w]ith very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability," because that finding is not consistent with VA's own definitions of "completely prostrating and prolonged" in the Manual M21-1. App. Br. at 7-11 (citing *Fugere v. Derwinski*, 1 Vet. App. 103, 108) (1990), *aff'd*, 972 F.2d 331 (Fed. Cir. 1991); M21-1, III.iv.4.G.7.b, f).

III. IF THE COURT DOES NOT REMAND FOR THE BOARD TO ADDRESS ITS DECISION IN *PIERCE*, THE COURT MUST ISSUE AN EN BANC DECISION.

In its decision in *Pierce*, this Court concluded that remand was required because the Board's "[f]ailure to 'acknowledge and consider' these potentially relevant regulations [i.e., 38 C.F.R. §§ 4.3, 4.7, and 4.21] was error." *Pierce*, 18 Vet. App. at 445 (citing *Schafrath v. Derwinski*, 1 Vet. App. 589, 593) (1991)). The Court instructed that "[o]n remand, the Board must explain its conclusion as to the applicability of §§ 4.3, 4.7, and 4.21 in terms of each of the factors specified in DC 8100 for a 50% rating . . . ." *Id.* (citing *Brown v. Gardner*, 513 U.S. 115, 118 (1994)).

Thus, where the Board fails to address the applicability of sections 4.3, 4.7, and 4.21, which necessarily encompasses the question of successive criteria, the Court's decision in *Pierce* directs that the appropriate remedy is remand for the Board to address these questions in the first instance. Significantly, the Court in *Pierce* did not hold that the Board must *actually* apply sections 4.3, 4.7, and 4.21 every time it determines the appropriate disability rating under DC 8100. Nor did the Court address whether DC 8100 contains successive criteria. It held only that, where the Board fails to address these questions, remand is the appropriate result and it otherwise left the determination as to these questions for the Board to decide in the first instance.

Accordingly, if the Court is inclined to rule here, on its own, whether DC 8100 contains successive criteria, the Court must issue an en banc decision. A panel decision of this Court resolving this question now would be inconsistent with *Pierce* and the result that decision requires. *See Bethea v. Derwinski*, 2 Vet. App. 252, 254 (1991) (panel

decision "binding precedent" unless overturned by en banc opinion of this Court or the Federal Circuit or U.S. Supreme Court).

CONCLUSION

Overlapping or cumulative criteria between higher and lower evaluations determine whether a diagnostic code involves successive criteria. If entitlement to the higher of two evaluations establishes entitlement to the lower rating because the criteria overlap, the criteria are successive and 38 C.F.R. §§ 4.3, 4.7, and 4.21 are not applicable in assigning the correct rating. Consistent with this principle, the criteria for ratings from 0 to 30 percent under DC 8100 are successive, and sections 4.3, 4.7, and 4.21 are therefore not applicable. It is debatable, however, whether the criteria for 30 and 50 percent ratings are successive and therefore whether sections 4.3, 4.7 and 4.21 are applicable. Finally, under *Pierce*, the Court should remand for the Board to address this question, as well as to provide an adequate statement of reasons or bases for finding that Mr. Johnson does not suffer from headaches "[w]ith very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability."

Respectfully submitted,

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