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.	)	

APPELLEE'S SUPPLEMENTAL MEMORANDUM OF LAW

Appellee, David J. Shulkin, M.D., Secretary of Veterans Affairs, submits this response to the Court's January 23, 2018, Order. The Order instructed the parties to provide a supplemental brief addressing three questions:

> (1) What are the determinants of whether a [Diagnostic Code (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* [*v. Principi*, 18 Vet.App. 440 (2004)] requiring an en banc decision to resolve?

As explained below, the Secretary's position is that: (1) the Court's decisions in *Tatum v. Shinseki*, 23 Vet.App. 152 (2009), and *Camacho v. Shinseki*, 21 Vet.App. 360 (2007), provide the test for successive rating criteria; (2) the criteria in DC 8100 are successive; and (3) a determination that DC 8100

contains successive rating criteria does not create a conflict with *Pierce v. Principi*, 18 Vet.App. 440 (2004).

In the August 10, 2016, decision on appeal, the Board of Veterans' Appeals (Board) denied Appellant, Mr. Willie S. Johnson, a rating in excess of 30% for mixed headaches, which is evaluated under 38 C.F.R. § 4.124a, Diagnostic Code (DC) 8100. In its recitation of the "Applicable Legal Requirements," the Board noted, among others, the following relevant Department of Veterans Affairs (VA) regulations:

> VA must resolve any reasonable doubt regarding the degree of disability in favor of the claimant. 38 U.S.C.A. § 5107(b); 38 C.F.R. § 4.3. Where there is a question as to which of two ratings apply, VA will assign the higher of the two where the disability picture more nearly approximates the criteria for the next higher rating. Otherwise, the lower rating will be assigned. 38 C.F.R. § 4.7; *see* 38 C.F.R. § 4.21.

[Record Before the Agency (R.) at 4]. Section 4.21 provides, in pertinent part, that "it is not expected, especially with the more fully developed grades of disabilities, that all cases will show all the findings specified." 38 C.F.R. § 4.21. The Board proceeded to determine that the rating criteria in DC 8100 are successive, and thus "[38 C.F.R.] § 4.7 is not applicable." [R. at 5].

In *Pierce*, the Court reviewed a Board decision that denied a disability rating higher than 30% for the claimant's service-connected vascular headaches. In that case, the Court noted that the Board failed to "acknowledge and consider" §§ 4.3, 4.7, and 4.21 and remanded, in part, for the Board to consider the

applicability of those regulations in terms of each of the elements specified for a 50% rating in DC 8100. *Pierce*, 18 Vet.App. at 445.

Later, in *Tatum* and *Camacho*, the Court made clear that §§ 4.7 and 4.21 do not apply to DCs that contain "successive" rating criteria. *Tatum*, 23 Vet.App. at 156 (holding that §§ 4.7 and 4.21 applied in that case, but only because the rating criteria were not successive, and explaining that neither is applicable when the rating criteria are successive); *Camacho*, 21 Vet.App. at 366 (holding that § 4.21 had no application to rating criteria where the structure of the language of those criteria were "clearly conjunctive"). It is within that framework that Appellee submits this response to the Court's January 23, 2018, Order.

1. This Court's decisions in *Tatum* and *Camacho* provide the determinants of whether a DC involves successive rating criteria.

Rating criteria are successive if "the evaluation for each higher disability rating include[s] the criteria of each lower disability rating, such that if a component was not met at any one level, the veteran could only be rated at the level that did not require the missing component." *Tatum*, 23 Vet.App. at 156; *see also Camacho*, 21 Vet.App. at 366-67. In *Tatum*, the Court addressed the interpretation and application of DC 7903, which is used to rate hypothyroidism. 23 Vet.App. at 154-56. In setting aside that part of the Board decision that denied entitlement to an increased rating under the code, the Court held that the Board erred when it concluded that all of the criteria listed for a 30% rating under DC 7903 must be met. *Id.* at 155. The Court found that the Board's construction

of DC 7903 as cumulative and not requiring the application of 38 C.F.R. § 4.7 "would eviscerate the meaning of § 4.7," which provides that the higher of two disability evaluations will be assigned if the disability picture more nearly approximates the criteria required for that rating. *Id.* at 156.

In articulating its decision in *Tatum*, the Court clarified its previous decision in *Camacho*, in which it affirmed the Secretary's position that DC 7913, the DC used to evaluate diabetes mellitus, required that all of the criteria listed for each particular rating under that DC be established in order for the respective rating to be assigned. *Tatum*, 23 Vet.App. at 156. Because of the "clearly conjunctive structure of the language used in specifying the criteria for a 40% disability rating under DC 7913," the *Camacho* Court also held that § 4.21 was inapplicable. *Camacho*, 21 Vet.App. at 366. In *Tatum*, the Court distinguished the two cases, explaining that while the DC at issue in *Camacho*, 7913 (diabetes), involved the application of successive rating criteria, DC 7903 (hypothyroidism) did not. *Tatum*, 23 Vet.App. at 156. The Court noted that unlike the criteria in DC 7913, a veteran rated for hypothyroidism under DC 7903 could potentially establish <u>all</u> of the criteria listed for either a 30 or 60% rating without establishing <u>any</u> of the criteria listed for a lesser rating. *Id.* Thus, the Court agreed with the appellant's argument that because DC 7903 did not contain successive rating criteria, the Board was required to consider whether a higher disability rating was warranted under 38 C.F.R. § 4.7. *Id.*

In another case considering DC 7913 and the applicability of § 4.7, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) held that "there is no question as to which evaluation shall be applied when a veteran does not satisfy all of the required criteria of the higher rating but does satisfy all of the criteria of the lower rating." *Middleton v. Shinseki*, 727 F.3d 1172, 1178 (Fed. Cir. 2013). In *Middleton*, the Federal Circuit agreed with this Court's reasoning in *Camacho* and explained that "the enumerated elements of DC 7913 required for a 40% rating are part of a structured scheme of specific, successive, cumulative criteria for establishing a disability rating: each higher rating includes the same criteria as the lower rating plus distinct new criteria." *Id.* Thus, rating criteria are successive where each criterion for the lower disability rating is included in the criterion for the higher disability rating. *See Middleton*, 727 F.3d at 1178; *Tatum*, 23 Vet.App. at 156. Further, in the case of successive, conjunctive criteria, such as that in DC 8100, the law is clear that neither § 4.7 nor § 4.21 apply. *See Tatum*, 23 Vet.App. at 156; *Camacho*, 21 Vet.App. at 316.

In contrast to §§ 4.7 and 4.21, the applicability of § 4.3 is not dependent on the characterization of the rating criteria. Instead, regulatory section 4.3, "Resolution of Reasonable Doubt," is a legal construct akin to the benefit of the doubt doctrine. *See* 38 U.S.C. § 5107(b); 38 C.F.R. § 3.102; *see also Mayhue v. Shinseki*, 24 Vet.App. 273, 282 (2011) (explaining that 38 C.F.R. §§ 3.102 and 4.3 employ the same "reasonable doubt" standard); *D'Aries v. Peake*, 22 Vet.App. 97, 106 (2008) ("the benefit of the doubt doctrine is a legal construct to

be applied by an adjudicatory body when the evidence is approximately balanced"). It is applicable where "a reasonable doubt arises regarding the degree of disability" a claimant exhibits. 38 C.F.R. § 4.3. In such cases, "doubt will be resolved in favor of the claimant" pursuant to 38 C.F.R. § 3.102. *Id*. If, for example, there is reasonable doubt regarding whether a claimant has characteristic prostrating attacks or whether such attacks occurred on average once a month over the last several months under DC 8100, then § 4.3 may apply to resolve such doubt in favor of the claimant to grant that 30% rating. If, however, the Board has determined that a claimant did not meet all of the necessary criteria for a 50% rating under DC 8100, which requires that all criteria must be met to establish entitlement to that rating, § 4.3 would not apply to allow the grant of the higher rating because, in such case, there is no reasonable doubt to resolve. Thus, § 4.3 is dependent upon the evidence of record, and may or may not apply in the case of successive rating criteria.

2. The rating criteria in DC 8100 are successive and conjunctive, and thus neither 38 C.F.R. § 4.7 nor § 4.21 apply.

Diagnostic Code 8100 contains successive and conjunctive rating criteria, in that each higher rating under the DC includes the components of the lesser disability ratings, and it requires that a veteran satisfy all of the criteria for a particular rating in order to establish entitlement to that rating. The rating criteria are successive because they build upon one another in both frequency and severity; one cannot fulfill a higher rating without fulfillment of a lower rating. *See*

Camacho, 21 Vet.App. at 366-67. Under DC 8100, a noncompensable rating is warranted for "less frequent [headache] attacks," a 10% rating is warranted for "characteristic prostrating attacks averaging one in 2 months over [the] last several months," a 30% rating is warranted for "characteristic prostrating attacks occurring on average once a month over [the] last several months," and a 50% rating is warranted for "very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability." 38 C.F.R. § 4.124a, DC 8100.

The following table illustrates the criteria associated with each rating under DC 8100:

50%	▪ Very frequent ▪ Completely prostrating ▪ Prolonged attacks ▪ Productive of severe economic inadaptability
30%	▪ Characteristic prostrating attacks ▪ On average once a month over the last several months
10%	▪ Characteristic prostrating attacks ▪ One in 2 months over last several months
0%	▪ Less frequent attacks

38 C.F.R. § 4.124a, DC 8100.

The 10 and 30% ratings under DC 8100 both require "characteristic prostrating attacks," with a greater frequency of attacks necessary for the higher rating. *See* 38 C.F.R. § 4.124a. Because a smaller number of something must necessarily be encompassed within a greater number of that same thing, it is impossible for an event to occur "on average once a month over [the] last several months" without that event also occurring on average "on[c]e in 2 months over

[the] last several months." *Id.* (emphasis added). Similarly, a noncompensable rating is provided for "less frequent attacks." *Id.* Because the comparative term "less" must be understood as referring to only attacks occurring with less frequency than those described for higher ratings, the noncompensable rating criterion is also clearly successive.

The criteria for a 50% rating are also successive with the lesser ratings in DC 8100. While the 50% rating adds multiple elements beyond the 30% rating, the addition of more than one element does not alter the successive nature of the rating criteria because the 50% rating clearly contains the criteria of the 30% rating. *See Middleton*, 727 F.3d at 1178 (agreeing that rating criteria are successive where "each higher rating includes the same criteria as the lower rating plus distinct new criteria"). Again, it is not possible to satisfy the criteria for a 50% rating without also satisfying the 30% rating. Moreover, the use of more qualitative instead of numerical language to describe the 50% rating criteria does not suggest it is not successive. The 50% criteria refer to attacks of greater frequency and severity than those described by the 10 and 30% criteria, requiring "very frequent completely prostrating and prolonged attacks." 38 C.F.R § 4.124a, DC 8100. The context of DC 8100 indicates that "very frequent" attacks means that the attacks must occur with greater frequency than the "average [of] once a month," which is required by the 30% criteria. *Id.* As to severity, similar to the comparison between the 10 and 30% ratings, an attack cannot be completely prostrating without it also being prostrating, and an attack cannot be prolonged

without it having first occurred. Thus, a completely prostrating and prolonged attack cannot be shown unless a prostrating attack is shown. The remaining distinction between the 50% criteria and the lesser ratings is the requirement that the relevant attacks be "productive of severe economic inadaptability." *Id.* Again, the addition of this requirement does not change the successive nature of the criteria because the 50% rating otherwise contains the criteria of the 30% rating.

Simply put, "very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability" (50%) encompasses "characteristic prostrating attacks occurring on an average once a month over the last several months" (30%), which in turn encompasses "characteristic prostrating attacks averaging one in 2 months over [the] last several months" (10%), which itself necessarily encompasses "less frequent attacks" (noncompensable). 38 C.F.R. § 4.124a, DC 8100. Diagnostic Code 8100 is thus not one under which a claimant could potentially establish all of the criteria for either of two disability ratings "without establishing *any* of the criteria for a lesser disability rating." *Tatum*, 23 Vet.App. at 156. To the contrary, a veteran rated under DC 8100 cannot establish any higher rating without first establishing all of the criteria of the lesser ratings. Accordingly, DC 8100 is successive, which, pursuant to the Court's discussions in *Tatum* and *Camacho*, renders § 4.7 inapplicable to determinations regarding the proper rating under DC 8100. *See Tatum*, 23 Vet.App. at 156*; Camacho*, 21 Vet.App. at 366.

This interpretation is consistent with several memorandum decisions in which the Court agreed that the criteria in DC 8100 are successive. *See, e.g., Ordillas v. Shinseki*, No. 11-3151, 2013 U.S. App. Vet. Claims LEXIS 903, at *6-8 (June 6, 2013) (holding § 4.7 does not apply because DC 8100 employs successive rating criteria); *Lunceford v. Shinseki*, No. 09-2413, 2011 U.S. App. Vet. Claims LEXIS 1013, at *4 (May 9, 2011) (holding § 4.7 does not apply because DC 8100 employs successive rating criteria); *see also Sergi v. McDonald*, No. 13-2120, 2014 U.S. App. Vet. Claims LEXIS 1999, at *4 (Dec. 2, 2014) (affirming a Board decision that found DC 8100 employs successive rating criteria).[1]

Similarly, because DC 8100 also contains conjunctive criteria, pursuant to the Court's decision in *Camacho*, § 4.21 is inapplicable to determinations regarding the proper rating under DC 8100. *See Camacho*, 21 Vet.App. at 366; *see also Watson v. Dep't of the Navy*, 262 F.3d 1292, 1299 (Fed. Cir. 2001) (noting that inclusion of the conjunctive "and" clearly indicates that all of the criteria listed in a regulation must be demonstrated). Again, though not binding on this Court, this is consistent with both Court memorandum decisions and VA's internal guidance for claims adjudication. *See Lunceford v. Shinseki*, No. 09-2413, 2011 U.S. App. Vet. Claims LEXIS 1013, at *3 (affirming a Board decision

[1] Pursuant to U.S. VET. APP. R. 30(a), the Secretary notes that no clear precedent exists on the precise issue of whether DC 8100 contains successive criteria and the reasoning in the cited nonprecedential decisions persuasively demonstrates the Secretary's position that case law supports the conclusion that the criteria are successive.

that found that DC 8100 employs conjunctive rating criteria and that denied entitlement to a rating greater than 30% for migraine headaches where the appellant did not meet all of the criteria under the 50% rating); M21-1, Part III, Subpart iv, Chapter 5, Section B.2.a. ("38 C[.]F[.]R[.] 4.21 does not apply to conjunctive rating criteria.").

3. If the panel were to agree that DC 8100 has successive rating criteria, that decision would not conflict with *Pierce*, and thus would not require an en banc decision.

If the Court were to agree that DC 8100 uses successive rating criteria, that conclusion would not create a conflict with *Pierce v. Principi*, 18 Vet.App. 440 (2004), requiring an en banc decision. In *Pierce*, the Court noted that the Board failed to address "the application of and interplay between" §§ 4.3, 4.7, and 4.21. 18 Vet.App. at 445. The Court found that the Board erred because of its "[f]ailure to 'acknowledge and consider' these potentially relevant regulations," and required the Board to "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." *Pierce*, 18 Vet.App. at 445 (emphasis added) (quoting *Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991)). While the Court in *Pierce* described the three regulations as "potentially relevant," it did not hold that they were, in fact, applicable to DC 8100. *See id.* Therefore, in adjudicating a claim under DC 8100, the Board may consider §§ 4.3, 4.7, and 4.21 but nonetheless find any or all of them inapplicable because the rating criteria in DC 8100 are successive, and the Board's decision will be in compliance with *Pierce*.

Indeed, this reading of *Pierce* is consistent with recent Court memorandum decisions that have considered the issue of whether the Board addressed §§ 4.3, 4.7, and 4.21 in accordance with *Pierce*. *See Sergi*, 2014 U.S. App. Vet. Claims LEXIS 1999, at *4 (affirming the Board decision where it is clear that the Board "considered and properly applied" §§ 4.3, 4.7, and 4.21, to include the Board's tacit finding that §§ 4.7 and 4.21 "did not apply in this case, as [the Board] found that DC 8100 employs successive rating criteria"); *see also*, *e.g.*, *Taggart v. Shulkin*, No. 16-4084, 2017 U.S. App. Vet. Claims LEXIS 1830, at *6-7 (Dec. 21, 2017) (finding no prejudice where the Board did not cite to *Pierce* but employed the required analysis of the pertinent regulations).[2] Moreover, the Court may clarify whether, and to what extent, §§ 4.3, 4.7, and 4.21 are applicable to evaluations under DC 8100 without the need for an en banc decision because *Pierce* did not resolve that question; rather, it merely found that those regulatory provisions were potentially relevant, but insufficiently addressed by the Board to facilitate judicial review. *See Pierce*, 18 Vet.App. at 445 (citing *Schafrath*, 1 Vet.App. at 593 (holding that the Board must consider all "potentially applicable" regulations)); *see also* U.S. VET. APP. R. 35(c) (noting that motions for full Court review "are not favored" and ordinarily "will not be granted unless such action is necessary to secure or maintain uniformity of the Court's decisions or to resolve a question of exceptional importance").

[2] Pursuant to U.S. VET. APP. R. 30(a), the Secretary notes that no clear precedent exists on this point and cites to these nonprecedential decisions for their persuasive logic and value.

Here, the Board complied with *Pierce*. The Board acknowledged and considered §§ 4.3, 4.7, and 4.21. [R. at 4 ("VA must resolve any reasonable doubt regarding the degree of disability in favor of the claimant. 38 U.S.C. § 5107(b); 38 C.F.R. § 4.3. Where there is a question as to which of two ratings apply, VA will assign the higher of the two where the disability picture more nearly approximates the criteria for the next higher rating. Otherwise, the lower rating will be assigned. 38 C.F.R. § 4.7; *see* 38 C.F.R. § 4.21.")]; *see Pierce*, 18 Vet.App. at 445 (requiring the Board to "acknowledge and consider" these potentially relevant regulations (quoting *Schafrath*, 1 Vet.App. at 593)). The Board specifically found that § 4.7 was "not applicable to DCs that apply successive rating criteria, such as DC 8100." [R. at 5 (citing *Tatum*, 23 Vet.App. at 156)]. Additionally, in determining that all of the criteria listed in the 50% rating must be met, the Board implicitly considered § 4.21 and determined that it was inapplicable. [R. at 5 ("the use of the conjunctive 'and' in a statutory provision means that all of the conditions listed in the provision must be met")]. Finally, regarding § 4.3, the Board found that the preponderance of the evidence weighed against Appellant's claim for entitlement to a 50% rating. [R. at 9]. Thus, the Board necessarily determined that the benefit of the doubt doctrine under §§ 3.102 and 4.3 is inapplicable. *See Ortiz v. Principi*, 274 F.3d 1361, 1364 (Fed. Cir. 2001) (holding that "the benefit of the doubt rule is inapplicable when the preponderance of the evidence is found to be against the claimant"); *Mayhue*, 24 Vet.App. at 282. Because the Board acknowledged and considered

§§ 4.3, 4.7, and 4.21, it complied with *Pierce*. Moreover, because the Court's holdings in *Pierce*, *Camacho*, and *Tatum* are not inconsistent, and the issue presented is not otherwise exceptional, en banc consideration is not required. *See* U.S. VET. APP. R. 35(c).

Accordingly, the Secretary submits that: (1) the Court's decisions in *Tatum* and *Camacho* provide the test for successive rating criteria; (2) the criteria in DC 8100 are successive; and (3) a determination that DC 8100 contains successive rating criteria does not create a conflict with *Pierce*.

WHEREFORE, the Secretary respectfully responds to the Court's January 23, 2018, Order.

Respectfully submitted,

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