



BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: March 1, 2019

MURETO C. HOLMES
2924 STARLIGHT DR
COPPERAS COVE, TX 76522

Dear Appellant:

The Board of Veterans' Appeals (Board) has made a decision in your appeal, and a copy is enclosed.

<i>If your decision contains a</i>	<i>What happens next</i>
Grant	The Department of Veterans Affairs (VA) will be contacting you regarding the next steps, which may include issuing payment. Please refer to VA Form 4597, which is attached to this decision, for additional options.
Remand	Additional development is needed. VA will be contacting you regarding the next steps.
Denial or Dismissal	Please refer to VA Form 4597, which is attached to this decision, for your options.

If you have any questions, please contact your representative, if you have one, or check the status of your appeal at <http://www.vets.gov>.

Sincerely yours,

K. Osborne
Deputy Vice Chairman

Enclosures (1)
CC: Disabled American Veterans



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BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

IN THE APPEAL OF
MURETO C. HOLMES
REPRESENTED BY
Disabled American Veterans


Docket No. 17-20 908

DATE: March 1, 2019

ORDER

Entitlement to an increased rating in excess of 50 percent disabling for migraine headaches on an extraschedular basis is denied.

FINDINGS OF FACT

1. The Veteran's migraine disability is currently rated as 50 percent disabling under Diagnostic Code 8100.
2. The established schedular criteria adequately contemplate the severity and symptomatology of the Veteran's migraine disability.

CONCLUSION OF LAW

The criteria for an increased rating in excess of 50 percent disabling for migraine headaches have not been met. 38 U.S.C. §§ 1155, 5107 (2012); 38 C.F.R. §§ 3.321, 4.1, 4.2, 4.7, 4.124a, Diagnostic Code 8100 (2018).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The Veteran served on active duty from June 1994 to August 1996.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from an August 2015 rating decision by the Department of Veterans Affairs (VA) Regional Office (RO) in Waco, Texas. Jurisdiction of the Veteran's claim was subsequently transferred to the RO in Boise, Idaho.

Entitlement to an increased rating in excess of 50 percent disabling for migraine headaches on an extraschedular basis

Disability ratings are determined by applying the criteria set forth in the VA Schedule for Rating Disabilities (Schedule), found in 38 C.F.R. Part 4 (2018). The Schedule is primarily a guide in the evaluation of disability resulting from all types of diseases and injuries encountered as a result of or incident to military service. The ratings are intended to compensate, as far as can practicably be determined, the average impairment of earning capacity resulting from such diseases and injuries and their residual conditions in civilian occupations. 38 U.S.C. § 1155; 38 C.F.R. § 4.1 (2018). Where 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 for that rating. Otherwise, the lower rating will be assigned. 38 C.F.R. § 4.7 (2018). When reasonable doubt arises as to the degree of disability, such doubt will be resolved in the Veteran's favor. 38 C.F.R. § 4.3 (2018).

As a preliminary matter, the Board notes the Veteran's migraine disability is currently rated as 50 percent disabling under Diagnostic Code 8100. 38 C.F.R. § 4.124a, Diagnostic Code 8100. Under Diagnostic Code 8100, a 50 percent disability rating is assigned where the evidence demonstrates migraine headaches with very frequent, completely prostrating and prolonged attacks productive of severe economic inadaptability. *Id.* For the entirety of the appeal period, the Veteran is in receipt of the highest schedular rating assignable under Diagnostic Code 8100 for his migraine disability.

In this case, the Veteran, through his representative, has raised the issue of entitlement to a higher disability rating on an extraschedular basis. As such, the Board has considered whether the increased rating appeal warrants referral for consideration of an extraschedular rating under 38 C.F.R. § 3.321.

In exceptional cases where schedular disability ratings are found to be inadequate, consideration of an extraschedular disability rating is made. 38 C.F.R. § 3.321(b)(1) (2018). There is a three-step analysis for determining whether an extra-schedular disability rating is appropriate. *Thun v. Peake*, 22 Vet. App. 111 (2008). First, there must be a comparison between the level of severity and symptomatology of the Veteran's service-connected disability and the established criteria found in the rating schedule to determine whether the Veteran's disability picture is adequately contemplated by the rating schedule. *Thun*, 22 Vet. App. 111. If not, the second step is to determine whether the Veteran's exceptional disability picture exhibits other related factors identified in the regulations as governing norms. *Thun*, 22 Vet. App. 111; 38 C.F.R. § 3.321(b)(1) (governing norms include marked interference with employment and frequent periods of hospitalization). If the factors of step two are found to exist, the third step is to refer the case to the Under Secretary for Benefits or the Director of the Compensation and Pension Service for a determination concerning whether, to accord justice, the Veteran's disability picture requires the assignment of an extra-schedular rating. *Thun*, 22 Vet. App. 111.

Based upon a review of the evidence, the Board finds that referral for consideration of an extraschedular rating under 38 C.F.R. § 3.321 is not warranted in this case.

First, the Board finds that the Veteran's disability picture is adequately contemplated by the rating schedule. A 50 percent evaluation under the relevant diagnostic codes contemplate very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability. Thus, any symptoms related to the Veteran's headaches that are productive of economic inadaptability and/or that cause prostrating attacks are taken into consideration. Report of the April 2010 VA neurologic examination reflects, in pertinent part, a diagnosis of migraine headaches. At that time, the Veteran reported throbbing headaches precipitated by noise, lack of sleep, and/or stress that occur approximately four times per week and last approximately six hours per day. The Veteran also indicated his headaches are associated nausea and photophobia, i.e., sensitivity to light. Similar findings were noted at VA examinations provided in August 2015 and March 2017. VA medical treatment records dated in May 2010 reflect the Veteran wears dark glasses to provide a sense of comfort and help prevent headache exacerbation. In a statement dated in September 2015, the Veteran reported that his migraine symptoms impact

his ability to focus and concentrate. The Veteran also reported being lightheaded in the mornings. In a statement dated in December 2018, the Veteran reported experiencing daily headaches of varying severity with associated photophobia, nausea, dizziness, anxiety, depression, and isolation. The Veteran indicated the headaches occur three to four times per week.

To that extent, the Board notes that a “migraine” is defined as familial symptom complex of periodic attacks preceded by prodromal sensory symptoms and commonly associated with irritability, nausea, vomiting constipation or diarrhea, and photophobia. Dorland’s Illustrated Medical Dictionary, 1166 (32nd ed. 2012). The rating criteria for migraines, by its very nature, contemplate the various manifestations of such disability by focusing on the overall functional impairment, rather than a demonstration of particular symptoms. Here, the Veteran’s 50 percent disability rating was assigned based on the severity, frequency, and duration of the symptoms reported by the Veteran and the resulting impairment of earning capacity. The Veteran has not specified any particular symptoms that are not contemplated by the relevant diagnostic criteria, as effects such as dizziness, anxiety, depression, isolation, nausea, etc, all address the nature of the headaches and effects on employment. The Board finds that the criteria adequately contemplate the Veteran’s disability picture.

Additionally, the Board notes that there is no evidence of marked interference with employment or frequent periods of hospitalization due to such disability. For instance, report of the March 2017 VA examination reflects, in pertinent part, the Veteran is gainfully employed as a heating, ventilation, and air conditioning (HVAC) mechanic. The Veteran reported that when he gets a headache at work, he simply “takes his [prescribed] migraine medication,” which eventually alleviates the pain. The examiner noted that the record does not reflect (nor has the Veteran reported) the presence of symptoms supporting a finding of significant functional impairment due to migraine headaches. Moreover, the Board notes that there is no evidence of frequent periods of hospitalization due to such disability.

In sum, the Board finds that the rating criteria adequately contemplates the Veteran’s disability picture. However, assuming *arguendo*, that the criteria did not adequately contemplate the Veteran’s disability picture, the Board also finds the evidence of record does not support a finding of such an exceptional or unusual

disability picture with such related factors as marked interference with employment or frequent periods of hospitalization as to render impractical the application of the regular schedular standards. 38 C.F.R. § 3.321(b)(1).

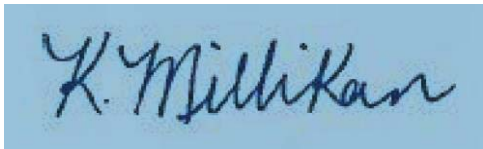
Lastly, the Board recognizes the August 2018 statement by the Veteran's representative requesting a remand for new VA examination. In particular, the Veteran's representative indicated that in the absence of a rating in excess of 50 percent, the Veteran request a remand for new VA examination. The representative did not indicate any actual worsening of the Veteran's symptoms or any other reason for such remand and examination.

The Veteran was most recently provided with a VA neurologic examination in March 2017. Since that time, the Veteran the Veteran has not reported (nor does the record reflect) a worsening of the Veteran's disability; rather, he simply continued to express his belief that a rating in excess of 50 percent was warranted. In the absence of evidence of worsening since the March 2017 VA examination, the Board is satisfied that the medical evidence of record adequately addresses the Veteran's current level of impairment. *See Snuffer v. Gober*, 10 Vet. App. 400, 403 (1997). Passage of time alone, without an allegation of worsening, does not warrant a new examination. *Palczewski v. Nicholson*, 21 Vet. App. 174 (2007).

IN THE APPEAL OF
MURETO C. HOLMES


Docket No. 17-20 908

In reaching these conclusions, the Board has considered the doctrine of reasonable doubt, however, as the preponderance of the evidence is against the Veteran's claim, the doctrine is not for application. *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990). Accordingly, the appeal is denied. |



K. MILLIKAN
Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD

S. Kalolwala, Associate Counsel

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. Your local VA office will implement the Board's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. Please note that if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your appeal at the Court because of jurisdictional conflicts. If you file a Notice of Appeal with the Court *before* you file a motion with the Board, the Board will not be able to consider your motion without the Court's permission or until your appeal at the Court is resolved.

How long do I have to start my appeal to the court? You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you*, you will have another 120 days from the date the Board decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time.* Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

How do I appeal to the United States Court of Appeals for Veterans Claims? Send your Notice of Appeal to the Court at:

**Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950**

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: <http://www.uscourts.cavc.gov>, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office.

How do I file a motion for reconsideration? You can file a motion asking the Board to reconsider any part of this decision by writing a letter to the Board clearly explaining why you believe that the Board committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that your letter be as specific as possible. A general statement of dissatisfaction with the Board decision or some other aspect of the VA claims adjudication process will not suffice. If the Board has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified will not be considered. Send your letter to:

**Litigation Support Branch
Board of Veterans' Appeals
P.O. Box 27063
Washington, DC 20038**

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to vacate? You can file a motion asking the Board to vacate any part of this decision by writing a letter to the Board stating why you believe you were denied due process of law during your appeal. *See* 38 C.F.R. 20.904. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address on the previous page for the Litigation Support Branch, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error? You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address on the previous page for the Litigation Support Branch, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400-20.1411, and *seek help from a qualified representative before filing such a motion*. See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

How do I reopen my claim? You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. *See* 38 C.F.R. 3.156(a).

Can someone represent me in my appeal? Yes. You can always represent yourself in any claim before VA, including the Board, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: <http://www.va.gov/vso/>. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before the VA, you can get information on how to do so at the Court's website at: <http://www.uscourts.cavc.gov>. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: <http://www.vetsprobono.org>, mail@vetsprobono.org, or (855) 446-9678.

Do I have to pay an attorney or agent to represent me? An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. *See* 38 C.F.R. 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

Fee for VA home and small business loan cases: An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

Filing of Fee Agreements: If you hire an attorney or agent to represent you, a copy of any fee agreement must be sent to VA. The fee agreement must clearly specify if VA is to pay the attorney or agent directly out of past-due benefits. *See* 38 C.F.R. 14.636(g)(2). If the fee agreement provides for the direct payment of fees out of past-due benefits, a copy of the direct-pay fee agreement must be filed with the agency of original jurisdiction within 30 days of its execution. A copy of any fee agreement that is not a direct-pay fee agreement must be filed with the Office of the General Counsel within 30 days of its execution by mailing the copy to the following address: Office of the General Counsel (022D), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. *See* 38 C.F.R. 14.636(g)(3).

The Office of the General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of the General Counsel. *See* 38 C.F.R. 14.636(i); 14.637(d).