IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

MICHAEL T. FORD,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 19-6722
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

JOINT MOTION FOR PARTIAL REMAND

Pursuant to U.S. Vet. App. Rules 27 and 45(g), the parties move the Court to vacate the part of the June 13, 2019, decision of the Board of Veterans' Appeals (Board) that denied entitlement to a rating in excess of 10% for traumatic brain injury (TBI) and entitlement to a compensable rating, prior to February 1, 2016, and in excess of 30%, thereafter, for migraine headaches, and to remand the issues for readjudication consistent with the following. [Record Before the Agency (R.) at 4-33].

The Court should not disturb that portion of the Board's decision that granted petitions to reopen claims of entitlement to service connection for a left knee disability and a right eye disability, entitlement to service connection for sleep apnea, and entitlement to an initial rating of 10% for TBI. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) ("The Court is not permitted to reverse

findings of fact favorable to a claimant made by the Board pursuant to its statutory authority").

Appellant is not challenging the portion of the Board's decision that denied entitlement to service connection for bruxism and entitlement to a compensable rating, prior to September 8, 2011, and a rating in excess of 10%, thereafter, for a left ankle sprain. The parties respectfully request that the Court dismiss the appeal as to that claim. *Pederson v. McDonald*, 27 Vet.App. 276, 285 (2015) (en banc) (explaining that the Court will dismiss issues abandoned on appeal).

Insofar as the Board remanded Appellant's claims of entitlement to service connection for a cervical spine disability, a lumbar spine disability, a right shoulder disability, a right knee disability, a left knee disability, and a neurological disability of the left hand, as well as entitlement to a rating in excess of 50% for posttraumatic stress disorder (PTSD) prior to October 9, 2015, these issues are not currently before the Court. *See Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order).

BASES FOR PARTIAL REMAND

The parties agree that vacatur, in part, and remand of the Board decision are warranted because the Board erred when it provided an inadequate statement of reasons or bases when it denied a rating in excess of 10% for TBI and increased staged ratings for migraines. *See* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990).

TBI

In denying entitlement to a rating in excess of 10% for Appellant's service-connected TBI, the Board found that, in relation to the February 2015 VA TBI examination, there were "no findings that warrant more than a '1' level of impairment in any facet of cognitive impairment." [R. at 22 (4-33)]. Rather, the Board found that the medical evidence of record established Appellant suffered from "mild memory loss," thus establishing level 1 impairment, but no higher. *Id*.

As noted by the Board, when assigning a rating for cognitive impairment, manifested by memory loss, due to a TBI, the rating criteria provides for the following:

> Impairment of memory, attention, concentration, executive functions are assigned numerical designations as follows: (0) No complaints of impairment of memory, attention, concentration, or executive functions; (1) A complaint of mild loss of memory (such as having difficulty following a conversation, recalling recent conversations, remembering names of new acquaintances, or finding words, or often misplacing items), attention, concentration, or executive functions, but without objective evidence on testing; (2) Objective evidence on testing of mild impairment of memory, attention, concentration, or executive functions resulting in mild functional impairment; (3) Objective evidence on testing of moderate impairment of memory, attention, concentration, or executive functions resulting in moderate functional impairment; and (Total) Objective evidence on testing of severe impairment of memory, attention, concentration, or executive functions resulting in severe functional impairment.

38 C.F.R. § 4.124a, Evaluation of Cognitive Impairment and Other Residuals of TBI Not Otherwise Classified. The parties agree that in evaluating Appellant's level of cognitive impairment pursuant to the criteria above, the Board provided an inadequate statement of reasons or bases.

Specifically, while the Board determined Appellant suffered from only "mild memory loss," indicative of level 1 impairment, the Board failed to acknowledge that in order for a higher level of impairment to be established, "objective evidence on testing" of more severe impairment was necessary. A review of the February 2015 VA examination report relied on by the Board shows that the examiner did not conduct neuropsychological testing in conjunction with the examination. [R. at 1693 (1689-95) (February 2015 VA TBI Examination)]. In its decision, the Board provided no discussion of the lack of neuropsychological testing and how, in accordance with the rating criteria above, Appellant's level of impairment could be adequately assessed without such testing.

Therefore, the parties agree that the Board's reasons or bases are inadequate in this regard. On remand, the Board must address the lack of neuropsychological testing and reconcile this fact with the rating criteria when determining Appellant's level of impairment and appropriate disability rating. In the event the Board determines that a new VA examination is necessary to address this issue, one should be conducted.

Migraines

In denying entitlement to a compensable rating for migraines, prior to February 1, 2016, parties agree that the Board's reasons or bases are inadequate because they are inconsistent with the Court's holding in *Johnson v. Wilkie*, 30 Vet.App. 245 (2018). Specifically, the Board failed to explain how it was defining the term "prostrating" when it determined that "there [was] insufficient evidence to show that [Appellant] experienced headaches manifested by characteristic prostrating attacks occurring on an average of once a month over several months." [R. at 24 (4-33)].

In a January 2014 Statement in Support of Claim, Appellant reported that he suffered from 4 headaches a week, the severity of which caused him to lie down, and that he had less severe headaches occurring 15 to 20 times a week. [R. at 783-84 (January 2014 Statement in Support of Claim)]. Further, at a May 2015 neurology appointment, Appellant reported that when a headache was present, he "prefers to be in a dark, quiet room." [R. at 764 (May 4, 2015 VA Neurology Procedure Note]. Finally, while the September 2014 VA examiner noted that Appellant's headaches were not prostrating, Appellant was noted to have symptoms of nausea, sensitivity to light, sensitivity to sound, and changes in vision, and the examiner noted Appellant's reports of experiencing aura and sensitivity to smell associated with his headaches. [R. at 792 (791-94) (September 2014 VA Headache Examination)].

While the Board noted that none of the VA examiners or medical providers had described Appellant's headaches as "prostrating," the parties agree that the Board's failure to define this term as required by the Court in *Johnson*, frustrates judicial review. Further, even if Appellant's headaches are not considered "prostrating," the Board erred in failing to explain whether the severity of his symptoms, as noted in the lay and medical evidence, more closely approximated the criteria for a compensable rating prior to February 1, 2016.

Additionally, in its decision, the Board noted that Appellant's "complaints have varied widely over time, with some reports that he denied experiencing routine headaches" to support its finding that a compensable rating was not warranted prior to February 1, 2016. [R. at 25 (4-33)]. The parties agree that this finding by the Board was not supported by the evidence of record. Specifically, the evidence suggests that rather than "widely varied complaints," as noted by the Board, Appellant's disability appears to have gone through cycles of improvement and worsening throughout the period on appeal.

For example, in its decision, the Board noted that VA treatment records showed Appellant reported several headaches a month in February 2015, but in April 2015 he reported that he was "headache free;" however, in May 2015, Appellant reported that his headaches had returned to December 2014 levels [13 to 18 headaches a month]. [R. at 24 (4-33); *see also* R. at 783-84; R. at 792; R. at 796; R. at 804-05]. Notably, periods of improvement and worsening of Appellant's headache disability is further supported by the medical evidence of

record which documents various forms of and adjustments to prescribed medications. *See* [R. at 768 (May 4, 2015 VA Administrative Note)]; [R. at 770 (August 12, 2015 VA Neurology Follow-up)]. Therefore, the Board is directed that when evaluating the severity of Appellant's headache disability prior to February 1, 2016, the disability must be examined in relation to it history. 38 C.F.R. § 4.1.

As to the Board's denial of a rating in excess of 30%, from February 1, 2016, for migraines, the parties agree that the Board provided an inadequate statement of reasons or bases, again for failing to define the terms in the diagnostic criteria pursuant to *Johnson*, as well as failing to explain whether the severity of Appellant's migraines resulted in economic inadaptability in the context of *Pierce v. Principi*, 18 Vet.App. 440, 445-46 (2004).

In the context of *Johnson*, the Board failed to define the terms "very frequent" and "completely" when it determined that Appellant was not entitled to a rating in excess of 30% from February 1, 2016. The parties agree that the Board's failure to define these terms and relate them to the specifics of Appellant's disability frustrates judicial review, requiring remand.

Additionally, when it denied a rating in excess of 30%, the Board found that Appellant's headaches were not productive of severe economic inadaptability, citing to evidence that Appellant had not worked since 2006 and thus, the evidence failed to show that he lost any time from work due to headaches. The parties agree that the Board inappropriately required Appellant to meet a higher legal standard than is required by Diagnostic Code (DC) 8100. In this regard, "nothing

in DC 8100 requires that the claimant be completely unable to work in order to qualify for a 50% rating." *Pierce*, 18 Vet.App. 445. Further, in *Pierce*, it was conceded that "productive of economic inadaptability" could be read to mean "productive of" or simply "capable of producing." *Id*. Therefore, for the Board to imply that in order for economic inadaptability to be shown, Appellant must have been employed, imposes a higher legal standard than is required by the rating criteria.

On remand, the Board shall readjudicate the issue of entitlement to increased staged ratings for Appellant's migraines, providing definitions of the terms used in the diagnostic criteria and addressing whether the severity of the headaches is capable of producing economic inadaptability. The Board must support any subsequent decision with an adequate reasons or bases, with discussion of all relevant lay and medical evidence of record. *See* 38 U.S.C. § 7104(d)(1); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990) (indicating the Board must provide an explanation of its material findings and conclusions sufficient to enable the claimant and the Court to understand the basis of its decision and permit judicial review).

Other Considerations

The parties agree that this joint motion and its language are the product of the parties' negotiations. The Secretary further notes that any statements made herein shall not be construed as statements of policy or the interpretation of any statute, regulation, or policy by the Secretary. Appellant also notes that any

statements made herein shall not be construed as a waiver as to any rights or VA duties under the law as to the matters being remanded except the parties' right to appeal the Court's order implementing this joint motion for partial remand (JMPR). The parties agree to unequivocally waive any right to appeal the Court's order on this JMPR and respectfully ask that the Court enter mandate upon the granting of this motion.

On remand, the Board must "reexamine the evidence of record, seek any other evidence the Board feels is necessary, and issue a timely, well-supported decision in this case." *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). Appellant shall be free to submit additional evidence and arguments in support of his claims. *Kutscherousky v. West*, 12 Vet.App. 369, 372 (1999); *see Clark v. O'Rourke*, 30 Vet. App 92 (2018). The Court has held that "'[a] remand is meant to entail a critical examination of the justification for the decision.'" *Kahana v. Shinseki*, 24 Vet.App. 428, 437 (2011) (quoting *Fletcher*, 1 Vet.App. at 397). Before relying on any additional evidence developed, the Board shall ensure that Appellant is given notice thereof, an opportunity to respond thereto, and the opportunity to submit additional argument or evidence. *See Thurber v. Brown*, 5 Vet.App. 119, 126 (1993).

In any subsequent decision, the Board shall provide an adequate statement of reasons or bases for its decision on all material issues of fact and law. *See* 38 U.S.C. § 7104(d)(1). The terms of this JMPR are enforceable. *Forcier v. Nicholson*, 19 Vet.App. 414, 425 (2006). The Board shall incorporate copies of

this JMPR and the Court's order into Appellant's record. The Secretary will afford this case expeditious treatment as required by 38 U.S.C. §§ 5109B, 7112.

CONCLUSION

WHEREFORE, the parties request that the Court vacate the part of the June 13, 2019, decision of the Board, that denied a rating in excess of 10% for TBI and entitlement to increased staged ratings for migraines, and to remand the issues for readjudication consistent with the foregoing.

Date: June 8, 2020

Respectfully submitted,

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