

**IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS**

GERALD E. KEELS,

Appellant,

v.

ROBERT A. McDONALD,
Secretary of Veterans Affairs,

Appellee.

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

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GERALD E. KEELS,)	
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Appellant,)	
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v.)	Vet. App. No. 16-181
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ROBERT A. McDONALD,)	
Secretary of Veterans Affairs)	
)	
Appellee.)	

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

I. ISSUES PRESENTED

1. Whether the Court should affirm the December 8, 2015 decision of the Board of Veterans' Appeals (BVA or Board), which denied a rating in excess of 30% for headaches secondary to eye trauma, because Appellant's first argument is fundamentally flawed in relying on evidence that pre-dates the applicable appeal period; and because the Board did not misinterpret the relevant rating criteria, or fail to consider *Pierce v. Principi, infra*, which was not applicable.

2. Whether Appellant's second "alternative" to his first argument should be rejected because the June 2012 examination, on which the Board heavily relied, is adequate.

3. Whether the Board appropriately determined that a referral for extraschedular consideration is not warranted based on the combined effects of Appellant's headaches and eyes, and whether the Board was further required to address the combined effects of the ankle disabilities and headaches where the record shows Appellant did not make this argument below, and the issue was not

reasonably raised by the record through evidence of the collective impact of the headaches and ankles.

4. In remanding the TDIU claim as inextricably intertwined with claims for increased ratings for eye ptosis and for the ankle disabilities, whether the Board violated *Brambley v. Principi, infra*.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252(a), which grants the Court of Appeals for Veterans Claims exclusive jurisdiction to review final decisions of the Board.

B. Nature of the Case

Appellant, Gerald E. Keels, seeks the Court's review of a December 8, 2015 Board decision. In that decision, the Board denied a rating in excess of 30% for headaches, secondary to eye trauma. Record Before the Agency [R. at 1-12].

Additionally, the Board remanded three increased rating claims for a rating in excess of 20% for degenerative joint disease of the right ankle with calaneal spurs; in excess of 20% for residuals of left leg ankle injury with traumatic arthritis of the ankle; and in excess of 10% for ptosis, left eyelid. [R. at 8]. The Board also remanded a claim for a rating based upon total disability due to individual unemployability (TDIU) finding it was inextricably intertwined with the ankle disabilities and ptosis claim. [R. at 9]. Thus, the Court lacks jurisdiction to

disturb the Board's findings as to these four additional claims. *Kirkpatrick v. Nicholson*, 417 F.3d 1361, 1364 (Fed. Cir. 2005).

However, Appellant's third and fourth arguments address the remanded claims insofar as purportedly having bearing on the denied headaches claim.

C. Statement of Relevant Procedural History and Pertinent Facts

Appellant served on active military duty in the United States Marine Corps from October 1974 to October 1978. [R. at 1808].

Informal claims for an eye condition, with associated headaches, were initially submitted to the Regional Office (RO) in October 1995. [R. at 1766-67]. A January 1996 RO decision granted service connection for eye ptosis, and denied service connection for headaches. [R. at 1750-51, 1746-47 (cover letter)]. As background information, service medical records (SMR) show the Veteran had sustained a left eye injury in December 1975 with residuals of some blurring and vision changes, as well as development of headaches. See [R. at 1726 (1726, 1729), 1761-62 (1995 VA examination), 1942 (Dec. 1975 SMR)].

After Appellant initiated an appeal as to the denied headaches claim, a March 1996 rating decision eventually granted service connection for the headaches, as secondary to the in-service eye trauma, and evaluated as 10% disabling. [R. at 1724 (cover letter), 1726, 1729 (rating decision pps. 1 and 2)]; see also [R. at 1727-28 (Appeal), 1736-40 (Mar. 1996 Statement of the Case (SOC)), 1744 (Mar. 1996 Notice of Disagreement (NOD))]. The RO explained its 10% award was based on Appellant's reporting "that the headaches now have

been ongoing as well as constant with exacerbations usually associated with bright light to the point that he has difficulties with driving at night . . . no associated nausea or vomiting or sonophobia, just photophobia.” [R. at 1726 (1726, 1729)].

Pertinent to some of Appellant’s opening brief arguments, in the month following the grant of secondary service connection of the headaches, an April 1996 RO decision denied service connection for injuries sustained to the left leg and ankle, as a result of a motorcycle accident while in service. [R. at 1707-08].

In April 1996, Appellant initiated an appeal as to the rating disability for the secondary service-connected headaches. [R at 1719-20]. An April 1996 SOC was issued and Appellant perfected his appeal, requesting a local hearing, which was held in December 1996. [R. at 1710-15, 1705-06, 1667-73]. Prior to the RO hearing, Appellant submitted lay statements and a private medical report, all of which were dated in December 1996, and discussed his difficulties at work as a firefighter with the Lake City Fire Department because of his left foot and leg pain from the in-service motorcycle accident. See [R. at 1674-81]; see also [R. at 1667 (1667-73) (hearing officer acknowledging “new evidence” provided and “will be made a matter of record and thoroughly considered.”)].

Based significantly on the Veteran’s hearing testimony, which the RO determined was “sufficient to establish characteristic prostrating attacks occurring on an average of once a month over the last several months as required for a 30% evaluation[,]” Appellant was awarded the higher initial evaluation of 30% in

a February 1997 rating decision. [R. at 1637 (1637-38), 1634-35 (cover letter)]. Of note, in that decision the RO discussed the December 1996 statements mentioned above but found the “new statements of witnesses and Dr. Graham did not refer to the eye or headaches.” [R. at 1637 (1637-38)].

In a March 1997 statement in support of claim, Appellant maintained his disagreement with the disability rating. [R. at 1612-13]. However, the RO continued the 30% rating in a December 1998 decision and Appellant submitted his substantive appeal in June 1999, and requested a BVA hearing. [R. at 1510-12, 1462-63].

A July 1999 Board hearing was held and covered the two issues then pending appeal, whereas Appellant had also continued his appeal of the denied left leg/ankle service connection claim. [R. at 1443 (1442-61) (confirming “issues before the Board today are entitlement to service connection for a left ankle and leg disorder and a dissatisfaction of the rating for the grant of service connection for headaches as secondary to ptosis of the left eye which is currently 30 percent”)]; see *also* [R. at 1556-58, 1566-68, 1587-91 (August 1998, May 1998 Supplemental SOC (SSOC) and Sept. 1997 SOC for left ankle, left leg condition)]. Appellant testified that because of his left ankle condition he was “currently out on worker’s comp. Right now pending separation for disability right now.” [R. at 1450-51 (1442-61)].

The two claims were remanded by the Board in October 1999. [R. at 1434-38].

In December 2009, VA received a letter from the Lake City Fire Department advising Appellant had been terminated in September 1999 because of the “left ankle that prohibits you from carrying out the duties listed in your job description.” [R. at 1333 (1333-34)].

In January 2000, Appellant was afforded an additional VA neurological disorders examination. [R. at 1318-19]. At the outset of his report, the examiner noted Appellant was a “former fireman who was retired on 09/30/99 secondary to an ankle injury.” [R. at 1318]. The examiner documented Appellant’s reporting of “onset of headaches since 1975 following a left eye injury” and “[s]ince that time he has had prominent photophobia and headaches which occur up to twice daily . . . heralded by either a tingling sensation over the left temple or by blurring of his vision.” *Id.* The headaches were described as lasting “for one to two hours and may be aborted by the early administration of Midrin which he carries in his pocket.” *Id.*

In April 2000 and February 2001, the RO issued SSOCs, continuing and confirming the denial of service connection for the left ankle/leg disability, and for an initial higher rating, greater than 30%, for the service-connected headaches secondary to eye trauma. [R. at 1300-03, 1208-15]. In April 2001, Appellant submitted a personal statement addressing the ongoing appeals of the two claims. [R. at 1202-03].

The claims returned to the Board in September 2001. [R. at 1165-80]. The instant claim for the initial evaluation in excess of 30% for headaches was

denied, not appealed by Appellant and, therefore, became final. [R. at 1173 (1165-73)]. The left leg and ankle service connection claim, on the other hand, was remanded and was granted in a November 2002 rating action. [R. at 1173-79, 1141-47]; see *also* [R. at 1157-58 (May 2002 VA joints examination report)].

Four years later, in April 2005, in addition to the left ankle/leg condition, Appellant submitted an informal claim for a right ankle condition. [R. at 1058 (1058-59)]. The RO denied this claim in a July 2005 rating action, which was appealed and eventually reached the Board in May 2009 at which time service connection for the right ankle was granted. [R. at 1038-43, 327-34]; see *also* [R. at 297-303 (May 2010 implementing rating decision)]. This BVA decision also remanded the issue of a higher rating for the left leg/ankle disorder. [R. at 331-32]. In remanding that latter claim, the Board determined “the case should be referred to the Director of VA’s Compensation and Pension Service” on the issue of an extraschedular rating for the left leg and ankle condition. [R. at 331].

In August 2009, the C&P Director found an extraschedular evaluation was unwarranted. [R. at 325]. The Director’s report concludes:

The veteran, 52 years old worked as a refrigeration and electrical repairman, and from 1993 to 1999 as a fire fighter. In September 1999 he was terminated and granted disability benefits based on his numerous joints arthritis. There is no indication that the veteran’s service connected disability of the left ankle markedly interferes with employment. This Service finds that entitlement to an extra-schedular evaluation for service connected arthritis of the left ankle is not warranted.

Id.

Ten years after issuance of the aforementioned final September 2001 BVA decision denying the higher rating in excess of 30% for the secondary service-connected headaches, the Veteran filed a formal application for increased compensation based on unemployability (TDIU) in January 2011. [R. at 228-30]. In this application, Appellant noted he had received disability from the state because of his bilateral ankle condition. [R. at 230]. As an aside, in the same month, Appellant received an increased evaluation, from 10% to 20%, for the left leg/ankle disability. [R. at 222-25].

In developing the TDIU claim, the RO obtained two VA examinations in June 2012, one for neurological disorders, and a second general medical examination, which included a separate and specific assessment of the ankle disorders. [R. at 160-64, 165-81]. In the neurological examiner's report, when describing the Veteran's medical history, the examiner noted Appellant advised he had been given Midrin in the past but "[h]e does not use medication." [R. at 161 (160-64)]. The Veteran endorsed ongoing headache pain described as "localized to one side of the head." *Id.* Associated symptoms were "[s]ensitivity to light" for "[l]ess than 1 day" on the left side. *Id.* Nausea, vomiting, sound sensitivity, and vision or sensory changes were all denied. *Id.* Importantly, Appellant explicitly denied experiencing any "characteristic prostrating attacks of migraine headache pain" or "very frequent prostrating and prolonged attacks of migraine headache pain[.]" [R. at 162-63 (160-64)]. The examiner determined

Appellant's headaches did not impact his ability to work and he did "not believe the veteran is unemployable because of his headaches." [R. at 164].

In contrast, the 2012 VA general medical examiner, who also conducted a specific ankles disorders assessment, opined as to the Veteran's functional limitations indicating his bilateral ankle conditions "render him unable to bear weight for prolonged periods" and "he lost his last job as a firefighter because of ankle problems" because of "difficulty walking, standing" and "cannot run." [R. at 170 (165-81)]. The examiner further advised that while "both ankles and calcaneal spur" of the right heel impair physical activity, this "should not impair or preclude sedentary employment." *Id.*; see also [R. at 171-72 (similar findings in ankle disorders portion of report)].

Following review of the June 2012 VA examination reports, the RO issued an August 2012 rating decision explaining this "constitutes our decision based on all issues we understood to be specifically made implied, or inferred in that Substantive Appeal." [R. at 144 (144-55)]. Based significantly on the June 2012 examiners' findings, the RO denied the TDIU claim, but it also decided increased rating claims, presumably finding they were raised by the medical evidence. See *id.* In deciding the increased rating claims, the RO increased the rating of the right ankle disorder, from 10% to 20% disabling. [R. at 151-52]. It continued the 20% evaluation of the left leg/ankle, the 30% for the secondary service-connected headaches, and the 10% for ptosis. [R. at 152]. As for denying an increased rating of the secondary service-connected headaches, the RO

explained its decision was primarily based on VA treatment records and the June 2012 VA neurological disorders examination showing “no post 1998 complaints of headache, no headache associated treatment and make no mention of any characteristic prostrating attacks” in treatment records dating between 1998 and 2012. [R. at 153 (144-55)].

As noted above, the RO also relied heavily on the June 2012 neurological examination report observing Appellant “specifically denied experiencing prostrating attacks of headache pain.” [R. at 153 (144-55)]. The RO added:

[a]lthough recent evidence shows some improvement in your headache condition, the current evaluation is continued as sustained improvement has not been definitively established. Since there is a likelihood of continued improvement, the assigned evaluation is not considered permanent and is subject to a future review examination.

Id.

Appellant submitted an NOD in September 2012, and an April 2013 SOC was issued by the RO. [R. at 139, 95-115]. Appellant perfected his appeal in the same month. [R. at 86-87].

The claims reached the Board on December 8, 2015. [R. at 1-12]. At the outset of its analysis, the Board determined the “appeal period for the [headaches] claim begins on June 5, 2011, one year prior to the date VA received the claim for an increased rating[.]” [R. at 6 (citing *Gaston v. Shinseki*, 605 F.3d 979, 984 (Fed. Cir. 2010))], and found “the Veteran has not received treatment for this disability during the period on appeal.” *Id.* In making that

determination, in addition to its discussions concerning the findings of the 2012 VA examiner, the BVA stated:

[w]ith regards to the VA treatment records, they show that the Veteran continues to intermittently experience headaches as a result of left eye sensitivity to light exposure; however, they do not indicate that the headaches result in prostrating attacks. See October 2013 and July 2012 treatment notes.

Id.; see also [R. at 64-65 (Oct. 2013 treatment note) (62-65), 2524-27 (July 2012 note)].

Accordingly, basing its decision on the competent medical evidence of record, the Board ultimately concluded “the Veteran’s headaches have not resulted in prostrating attacks at any point during the period on appeal,” and, therefore, “cannot find that the disability more nearly approximates the criteria corresponding to a higher 50 percent rating.” [R at 6 (2-12)]. The Board added the Veteran has “not alleged or presented other lay evidence” indicating otherwise. *Id.*

The Board then addressed whether referral for extraschedular consideration was warranted, but determined “[r]he rating criteria of DC 8100 reasonably describe the Veteran’s disability level and these symptoms as they specifically contemplate headaches. The Veteran’s disability picture is contemplated by the rating schedule.” *Id.* The Board added that there “is no combined/compound symptomatology from the impact of multiple service-connected disabilities that is not contemplated by the ratings schedule and would require referral for extraschedular consideration.” *Id.*

With respect to some of Appellant's current arguments in his brief, it is also important to consider that the Board, in remanding the eye ptosis and ankle disabilities claims, found that while the Veteran had undergone a 2014 VA eye examination, "this examination was for an unrelated eye disability not on appeal. Accordingly, this claim is remanded so that an adequate visual examination may be scheduled specifically for the Veteran's ptosis, left eye lid." [R. at 8 (1-12)]. As for its remand of the ankles disabilities, the Board noted the "Veteran, through his representative, has asserted that his disabilities have worsened since his June 2012 VA examination. July 2013 Statement of Accredited Representative in Appealed Case." *Id.*; see also [R. at 75-77].

The Board determined that "assertion is supported by a November 2012 VA treatment record that shows that the Veteran reported to his physicians increased swelling in his ankles" and accordingly found "there is evidence that the Veteran's ankle disabilities have increased in severity and therefore a new VA examination is needed to determine their current state." [R. at 8 (1-12), 2057-59 (Nov. 2012 treatment note)]. Lastly, the Board determined the TDIU claim is inextricably intertwined with the eye and ankles claims and remanded the TDIU claim as well. [R. at 9].

III. SUMMARY OF ARGUMENT

The Secretary maintains the Court should affirm the December 8, 2015 Board decision denying a rating in excess of 30% for headaches, secondary to eye trauma, because Appellant's first argument is fundamentally flawed for its

reliance on evidence that pre-dates the applicable appeal period; and because the Board did not misinterpret the relevant rating criteria or fail to apply *Pierce v. Principi*, 18 Vet.App. 440 (2004), which was not applicable. As for Appellant's second "alternative" to his first argument, claiming the June 2012 examination is inadequate, the Secretary respectfully contends this argument should also be rejected because the examination is, in fact, adequate such that the Board was justified in relying thereon to conclude Appellant's headaches are no longer prostrating.

In response to Appellant's third argument, the Secretary asserts the Board appropriately determined that a referral for extraschedular consideration is not warranted based on the combined effects of Appellant's headaches and eyes; and the BVA was not required to further address combined effects of the ankle disabilities and headaches whereas the record shows Appellant did not make this argument below, nor was such issue reasonably raised by the record through evidence of the collective impact of the headaches and ankles.

Lastly, in remanding the claim for TDIU, along with claims for increased ratings for eye ptosis and for the ankle disabilities, the Board did not violate *Brambley v. Principi*, 17 Vet.App. 20 (2003).

IV. ARGUMENT

1. THE COURT SHOULD AFFIRM THE DECEMBER 8, 2015 BOARD DECISION DENYING A RATING IN EXCESS OF 30% FOR HEADACHES, SECONDARY TO EYE TRAUMA, BECAUSE APPELLANT'S FIRST ARGUMENT IS FUNDAMENTALLY FLAWED IN RELYING ON EVIDENCE THAT PRE-DATES THE APPLICABLE APPEAL PERIOD; AND BECAUSE THE BOARD DID NOT MISINTERPRET THE RELEVANT RATING CRITERIA OR FAIL TO APPLY *PIERCE v. PRINCIPI*, WHICH WAS NOT APPLICABLE.

Appellant's first argument challenges the Board's ultimate determination that treatment records, as well as the June 2012 VA examination report, show that while the Veteran "continues to intermittently experience headaches as a result of left eye sensitivity to light exposure; . . . they do not indicate that the headaches result in prostrating attacks." [R. at 6 (1-12)]. Appellant's first argument is unavailing for several reasons. First, in his misguided attempt to counter the Board's non-prostrating determination, Appellant relies on evidence outside the relevant appeal period. See Appellant's Brief (AB) at 9-10. Second, he argues the Board should have applied the rule of law enunciated in *Pierce v. Principi, supra*, see (AB at 8-9), but that case is not applicable here, or, if any error exists in not discussing that case, Appellant suffered no prejudice, as the outcome would have been the same since the evidence fails to satisfy the key criterion under DC 8100. Third, in arguing the Board "failed to discuss whether Mr. Keels' headaches were capable of producing severe economic inadaptability[,] (AB at 10), Appellant likewise fails to appreciate that determination was unnecessary once the Board found he did not have prostrating headaches.

In arguing “[h]ere, the evidence of record suggested that the Veteran’s headaches may rise to the level of prostrating[.]” Appellant relies solely upon three items of evidence – a portion of the June 2012 unfavorable medical opinion, the Veteran’s 1999 BVA testimony, and his April 2001 personal statement. See (AB at 9) (citing to R. at 161 (160-64), 1453 (1442-61), 1202 (1202-03)). Relying on 1999 and 2001 evidence is fatal to his argument because that evidence has no bearing whatsoever on his present increased rating claim since “the relevant temporal focus for adjudicating an increased-rating claim is on the evidence concerning the state of the disability from the time period one year before the claim was filed until VA makes a final decision on the claim.” *Hart v. Mansfield*, 21 Vet.App. 505, 509 (2007)); accord *Francisco v. Brown*, 7 Vet.App. 55, 58 (1994) (explaining that in increased rating claims, “the present level of disability is of primary concern”). Only if the claim on appeal was for an initial higher rating would the earlier evidence be germane. Cf. *Moore v. Nicholson*, 21 Vet.App. 211, 216-17 (2007) (for initial disability rating, VA must consider severity of disability during period for which veteran is eligible for service connection starting on date application was filed).

Here, as the Board appropriately found, the appeal period for the headaches claim “begins on June 5, 2011, one year prior to the date VA received the claim for an increased rating.” [R. at 6 (1-12)]. Appellant does not dispute that factual finding and cannot do so going forward. See *Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999) (“[C]ourts have consistently concluded that the

failure of an appellant to include an issue or argument in the opening brief will be deemed a waiver of the issue or argument.”) (citing *Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990)); *Williams v. Gober*, 10 Vet.App. 447, 448 (1997) (BVA determinations unchallenged on appeal deemed abandoned).

The BVA’s determination as to the relevant appeal period is plausibly based on the record where the evidence shows Appellant did not appeal the last final September 2001 Board decision denying the headaches claim. See [R. at 1165-80]. Subsequently, after submitting his TDIU claim and the RO obtained the 2012 examinations in developing that claim, the neurological examination report gave rise to the instant increased rating claim. See [R. at 144 (144-55) (2012 RO noting adjudicated all issues “understood to be specifically made, implied, or inferred”)]. In this regard, it is well-accepted that VA medical examination reports (and hospital admissions) may constitute informal claims for an increased disability rating. See generally *Norris v. West*, 12 Vet.App. 413, 417 (1999); 38 C.F.R. § 3.157(b); see also *Roberson v. Principi*, 251 F.3d 1378, 1382-84 (Fed. Cir. 2001) (distinguishing informal claims arising from medical records and formal claims); *Servello v. Derwinski*, 3 Vet.App. 196, 198 (1992) (submission of medical records may constitute informal claim under 38 C.F.R. § 3.155(a)); *Quarles v. Derwinski*, 3 Vet.App. 129, 137 (1992) (submitting medical records gives rise to obligation to forward formal application form to veteran).

Thus, as stated, Appellant's reliance on irrelevant evidence pre-dating the instant increased rating claim period has no merit and serves to defeat his argument because he has not carried his burden of persuasion. See generally *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) ("An appellant bears the burden of persuasion on appeals to this Court to show that such reliance was in error."), *aff'd* 232 F.3d 908 (Fed. Cir. 2000); *Berger v. Brown*, 10 Vet.App. 166, 169 (1997) (stating that "the appellant ... always bears the burden of persuasion on appeals to this Court").

To the extent he relies on a portion of the 2012 neurological examination report, but bypasses the fact that he clearly denied experiencing "characteristic prostrating attacks of migraine headache pain" or "very frequent prostrating and prolonged attacks of migraine headache pain", his argument remains meritless because the report was plainly unfavorable to his claim. Compare [R. at 162-63 (160-64)] and [R. at 161]. But see *Acevedo v. Shinseki*, 25 Vet.App. 286, 294 (2012) (the examination report "must be read as a whole, and the Board is permitted to draw inferences based on the overall report so long as the inference does not result in a medical determination"). As an aside, any allegations of inadequacy as to the 2012 examination appearing in his first argument will be further addressed below by the Secretary when responding to Appellant's second argument.

Turning to Appellant's *Pierce* argument, the Secretary avers that decision fails to assist the Veteran because 38 C.F.R. §§ 4.3, 4.7, and 4.21 are not

applicable here in light of the Board's sound determination that the first criterion of DC 8100 was not substantiated because Appellant's headaches are not prostrating. See (AB at 8-10). As the Board's statement shows that key determination was plausibly based on evidence in the record to include not only the June 2012 examiner's report, but also on treatment records reflecting Appellant reported headaches intermittently, such as in October 2013, but at other times he denied experienced any headaches, including at a July 2012 medical visit. *Id.*; see also [R. at 65 (62-66), 2525 (2524-27)].

The Secretary would note that the record contains additional medical evidence to support the Board's non-prostrating determination in other VAMC visits that were close in time to the relevant appeal period. See e.g. [R. at 2201 (2200-02) (Aug. 2010 indicating "Pt denies ... dizziness, lightheadedness, headache, visual changes"), 2214 (2213-14) (Jul. 2010 documenting chief complaint of left eye pain after getting new glasses and advising after eye injury 30 years earlier, "[v]ision has been blurry since and with pain to the area, headaches."); see also [R. at 2243 (Sept. 2009 review of system "[d]enies headaches") (2243-45), 2320 (2319-22) (Sept. 2007 new patient visit "Pt denies ... headaches")].

Absent evidence that the Board erred in finding Appellant does not suffer from prostrating attacks, let alone very frequent completely prostrating and prolonged attacks—which is explicitly required in Diagnostic Code 8100 for a 50%

rating—the Board’s consideration of the application of and interplay between 38 C.F.R. §§ 4.3, 4.7, and 4.21 would have no effect on the outcome of the decision.

Should the Court find *Pierce* is applicable, and to the extent the Board did not more fully discuss the application of and interplay between 38 C.F.R. §§ 4.3, 4.7, and 4.21, the Secretary contends any error in this regard is harmless because, as stated, the regulations are not potentially applicable in the instant case. See 38 U.S.C. § 7261(b)(2) (requiring the Court to “take due account of the rule of prejudicial error”). Therefore, remand is not warranted. See *Soyini v. Derwinski*, 1 Vet.App. 540, 546 (1991) (holding that “strict adherence” to reasons or bases requirement where “overwhelming” evidence was against the claim would unnecessarily impose additional burdens on the Board with no benefit flowing to the veteran); see also *Valiao v. Principi*, 17 Vet.App. 229, 232 (2003) (holding that, “[w]here the facts averred by a claimant cannot conceivably result in any disposition of the appeal other than affirmance of the Board decision, the case should not be remanded for development that could not possibly change the outcome of the decision”).

Lastly, Appellant argues the Board’s statement is deficient in failing to “discuss whether Mr. Keels’ headaches were capable of producing severe economic inadaptability.” (AB at 10). While it is true the Board did not discuss the issue of severe economic inadaptability, the Board was also not required to do so upon appropriately finding the evidence does not show Appellant has prostrating headaches. The case of *Tatum v. Shinseki*, 23 Vet.App. 152, 156

(2009) (discussing 38 C.F.R. § 4.7 higher possible evaluation applies if disability picture more clearly approximates the criteria for that rating) is insightful in this regard. As for 38 C.F.R. § 4.7, for example, the regulation is not applicable to DCs that apply successive rating criteria where “the evaluation for each higher disability rating include[s] the criteria of each lower disability rating, such that if a component [i]s not met at any one level, the veteran could only be rated at the level that did not require the missing component.” *Tatum v. Shinseki*, 23 Vet.App. at 156. Where that is the case, to permit a rating at the higher percentage, “where only two out of the three criteria were met, would eviscerate the need for [a lower rating percentage] since the symptoms established for either rating might be the same.” *Id.* (citing *Camacho v. Nicholson*, 21 Vet.App. 366–67 (2007)).

Here, for a 10% disability rating under DC 8100, its language phrased slightly differently, requires infrequent prostrating attacks. For a 30% disability rating, frequent prostrating attacks are required. And for a 50% disability rating, the regulation requires very frequent prostrating attacks that are completely prostrating and prolonged and that cause severe economic inadaptability. Thus, because the criteria of each lower disability rating is included in the higher disability rating, DC 8100 employs successive rating criteria making § 4.7 not applicable to the Veteran’s claim and the Board was not required to reach the issue of severe economic inadaptability.

Moreover, the Secretary would note that when arguing a lapse of discussion on severe economic inadaptability, Appellant again relies on evidence significantly pre-dating the relevant period on appeal. He cites to R. at 446 (445-47), see (AB at 11), which was a 2002 disability record, and also relies on the April 2001 statement and his July 1999 BVA testimony. (AB at 12) (citing to R. at 1202 (1202-03), 1448, 1453, 1455 (1442-61). *But see Hart v. Mansfield; Francisco v. Brown; both supra.* Thus, Appellant again fails to carry his burden of persuasion and his entire first argument should be rejected. See *Hilkert v. West; Berger v. Brown; both supra.*

2. APPELLANT'S SECOND "ALTERNATIVE" ARGUMENT SHOULD ALSO BE REJECTED BECAUSE THE JUNE 2012 EXAMINATION ON WHICH THE BOARD HEAVILY RELIED IS ADEQUATE.

Recognizing that the Board had a plausible basis in relying significantly on the June 2012 VA examination report, see generally *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (holding a medical examination is adequate, and the Board may rely on it, when it is based on the Veteran's history and describes the disability in sufficient detail to inform the Board's decision), Appellant lays challenges to the adequacy of that report.

He first criticizes the fact that the examiner checked a box for indicating the Veteran does not have characteristic prostrating attacks of migraine headache pain, and argues no further explanation is provided. (AB at 12). However, reading the report in full, it is patently clear that in obtaining the Veteran's medical history, as the examiner was required to do, the Veteran, himself, denied

having prostrating headaches. See *Acevedo v. Shinseki*, 25 Vet.App. at 294. In fact, a full and fair reading of the report shows that portion of the Disability Benefits Questionnaire (DBQ) requires the examiner to question the Veteran as to whether he does or does not “have characteristic prostrating attacks of migraine headache pain” and only if he affirmatively responds “yes,” is the examiner to indicate the frequency of those types of headaches. [R. at 162 (160-64)]. Thus, for Appellant to next argue that the examination is inadequate because the examiner did not “provide any information *how often* Mr. Keels experienced headaches[,]” (AB at 13) (emphasis in original), his argument is meritless.

The Court’s case law regarding the adequacy of an examination or medical opinion is well-settled. “[E]xamination reports are adequate when they sufficiently inform the Board of a medical expert’s judgment on a medical question and the essential rationale for that opinion.” *Monzingo v. Shinseki*, 26 Vet.App. 97, 105 (2012); see also *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008) (explaining that, to be adequate, “a medical examination report must contain not only clear conclusions with supporting data, but also a reasoned medical explanation connecting the two”); *Stefl v. Nicholson*, 21 Vet.App. 120, 124 (2007) (“[A] medical opinion . . . must support its conclusion with an analysis that the Board can consider and weigh against contrary opinions.”); *Green v. Derwinski*, 1 Vet.App. 121, 124 (1991) (holding that a medical examination must contain

sufficient detail “so that the evaluation of the claimed disability will be a fully informed one”).

Here, in documenting Appellant’s reporting denying prostrating headaches, the June 2012 examination report sufficiently informed the Board of the medical expert’s judgment on a medical question. Moreover, it again bears noting that in addition to the Board’s reliance on the June 2012 report, the Board also relied on Appellant’s treatment records showing reports of intermittent headaches, not of a prostrating character, and no treatment for the headaches. [R. at 6 (1-12)]; see also [R. at 65 (62-66), 2525 (2524-27), 2201 (2200-02); 2214 (2213-14)].

Before concluding this responsive argument, the Secretary would point out that even the RO, in rendering the underlying August 2012 rating decision, observed that Appellant “specifically denied experiencing prostrating attacks of headache pain” at his June 2012 VA examination. [R. at 153 (144-55)]. The RO added that “recent evidence shows some improvement in your headache condition,” but it did not disturb “the current evaluation . . . as sustained improvement has not been definitively established.” *Id.* Appellant did not contest those findings in either his NOD, or his substantive appeal, which instead expressed a simple general disagreement with the RO’s decision. See [R. at 139, 86-87]. In his brief, he points to no medical or lay evidence indicating otherwise. As noted above, it is his burden to persuade the Court that an error has occurred and he has not done so. *Hilkert v. West; Berger v. Brown*; both *supra*.

3. THE BOARD APPROPRIATELY DETERMINED THAT A REFERRAL FOR EXTRASCHEDULAR CONSIDERATION IS NOT WARRANTED BASED ON THE COMBINED EFFECTS OF APPELLANT'S HEADACHES AND EYES, BUT IN REGARD TO HIS ANKLE DISABILITIES AND HEADACHES, THIS ISSUE WAS NEITHER ARGUED BY THE CLAIMANT, NOR REASONABLY RAISED BY THE RECORD THROUGH EVIDENCE OF THE COLLECTIVE IMPACT OF THE HEADACHES AND ANKLES.

Appellant argues, similar to the Veteran in *Yancy v. McDonald*, 27 Vet.App. 484, 489 (2016), that the Board should have discussed whether he was entitled to extraschedular referral for his service-connected disabilities on a collective basis pursuant to *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014). See (AB at 14-20). As the *Yancy* Court made clear, however, “[n]othing in *Johnson* changes the long-standing principle that the issue of whether referral for extraschedular consideration is warranted must be argued by the claimant or reasonably raised by the record.” 27 Vet.App. at 495. Dissimilar to *Yancy* where both parties agreed that the Board failed to address referral for extraschedular consideration for his service-connected disabilities on a collective basis and the record contained evidence of the collective impact of his service-connected disabilities; here, in the instant decision, the Board addressed the issue as it pertains to the headaches and eyes, but as far as the ankle disabilities, Appellant did not make that argument below and he has not shown that the issue was reasonably raised by the record for the relevant time period.

The Secretary does not dispute that evidence in this case shows the Veteran's Appellant's service-connected ankle/leg disabilities affected his employment and resulted in his termination from the fire department in

September 1999. See e.g. [R. at 170, 171-72 (165-81), 325, 1318 (1318-19), 1333 (1333-34), 1674-81]. However, nothing in the record for the appeal period reflects, or has bearing upon the issue of entitlement to referral for extraschedular consideration of Appellant's service-connected disabilities *on a collective basis* to include his ankle disabilities as in *Yancy*.

The claim on appeal in the *Yancy* matter was an increased disability rating for the Veteran's foot disability. The Court found the record reasonably raised the issue of extraschedular consideration on a collective basis, stating:

For example, in his June 2011 Substantive Appeal, Mr. Yancy stated that, "[d]ue to the current condition of [his] feet and knees, [he] ha[s] been unable to remain as physically active" and that he was not able to stand for longer than 15 to 20 minutes. . . . At the same time, the record reflects that Mr. Yancy experienced "discomfort upon prolonged sitting" due to his service-connected hemorrhoids. . . . Thus, the record reflects that Mr. Yancy cannot stand or sit for long periods of time as a result of his service-connected disabilities.

Id. at 496 (RBA citations omitted).

In his brief, once again, Appellant attempts to support his argument by relying on evidence outside of the appeal period. In point, after discussing the ankle disabilities as appears in the June 2012 VA general medical examination report, Appellant then relies on 2001 evidence discussing his headaches at that time. See e.g. (AB at 17) ("Additionally, Mr. Keels' headaches prevented him from leaning over or lifting heavy weights. R-1202. Thus, Mr. Keels' headaches and ankle disabilities combined to affect his physical mobility beyond their individual schedular ratings."). Later in his third argument, he further relies on

the evidence dating back to 1999 or 2002. (AB at 19) (citing to R. 1453, 1455 (1442-61) (1999 BVA hearing) and 446 (445-46) (Aug. 2002 disability report)). Appellant has pointed to no evidence in the appeal period reasonably raising any collective or combined symptomatology of the head and ankles.

He next argues that “Mr. Keels’ service-connected eye condition resulted in difficulty keeping his left eye open” and if the eye was open he would develop the headaches. (AB at 17). In so arguing, what he overlooks is that when considering whether referral is warranted based on the combined effects of a veteran’s service-connected disabilities, the Board first must compare the Veteran’s symptoms with the assigned schedular ratings and if the schedular evaluations reasonably contemplate the Veteran’s symptomatology—including any symptoms resulting from the combined effects of multiple service-connected disabilities—then the first *Thun* step is not satisfied, and referral is not warranted. See *Thun v. Peake*, 22 Vet.App. 111, 116 (2008).

Here, because Appellant’s headaches are service-connected *secondary* to his eye trauma, he is already compensated for his eye/headaches symptomatology. In this regard, the Board specifically noted his “service-connected headaches are the result of light exposure to his light sensitive eye and manifest in nonradiating burning pain around the eye, localized to that side of the face.” [R. at 7 (2-12)]. Accordingly, the Board determined, “[t]here is no combined/compound symptomatology from the impact of multiple service-connected disabilities that is not contemplated by the ratings schedule and would

require referral for extraschedular consideration.” *Id.* Thus, the Board’s statement of reasons or bases is adequate and the Court should affirm. See *Thun, supra*; see also *Gilbert v. Derwinski*, 1 Vet.App. 49 (1990).

4. IN REMANDING THE CLAIM FOR TDIU AS INEXTRICABLY INTERTWINED WITH CLAIMS FOR INCREASED RATINGS FOR EYE PTOSIS AND FOR THE ANKLE DISABILITIES, THE BOARD DID NOT VIOLATE *BRAMBLEY v. PRINCIPI, supra*.

In Appellant’s fourth and final argument, he alleges error in the Board decision for denying referral for extraschedular consideration, but remanding the TDIU claim; and he relies heavily on *Brambley v. Principi, supra* at 24 (criticizing the Board for maintaining “divergent positions concerning the completeness of the record” without further explanation). (AB at 20-22). However, *Brambley* and the instant case are entirely dissimilar whereas the instant Board decision contains no inconsistent positions on the completeness of the record and, therefore, does not violate the Court’s guidance in *Brambley*.

The Board remanded the increased rating claims for service-connected eye ptosis and ankle disabilities because it, respectively, found that while the Veteran had undergone a 2014 VA eye examination, “this examination was for an unrelated eye disability not on appeal. Accordingly, this claim is remanded so that an adequate visual examination may be scheduled specifically for the Veteran’s ptosis, left eye lid.” [R. at 8 (1-12)]. As for remand of the increased rating of the bilateral ankle disorders, the Board similarly determined “there is evidence that the Veteran’s ankle disabilities have increased in severity and

therefore a new VA examination is needed to determine their current state.” *Id.* The Board then remanded the issue of TDIU because the claim was “inextricably intertwined with the eye and ankles claims “because the severity of those disabilities will impact his overall disability picture and its impact on his ability to maintain substantially gainful employment.” [R. at 9 (1-12)].

Thus, the decision does not contain divergent positions with respect to the 30% secondary service-connected headaches and denial of an extraschedular referral as to that claim. Moreover, the Court has recognized that in many instances the issues relevant to referral for extraschedular consideration and to entitlement to TDIU are not necessarily inextricably intertwined. See *Kellar v. Brown*, 6 Vet.App. 157, 162 (1994); *Stanton v. Brown*, 5 Vet.App. 563, 564–70 (1993). Thus, Appellant’s final argument is also unavailing.

V. CONCLUSION

WHEREFORE, Appellee Robert A. McDonald, Secretary of Veterans Affairs, respectfully submits that the Board’s December 8, 2015, decision should be affirmed because none of Appellant’s arguments warrant remand.

Respectfully submitted,

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