

REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

16-181

GERALD E. KEELS

Appellant

v.

ROBERT A. MCDONALD
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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APPELLANT'S REPLY ARGUMENTS

I. The Board failed to adequately analyze whether the Veteran's headaches were prostrating.

The Board entirely failed to discuss *Pierce v. Principi* or analyze Mr. Keels' symptoms in light of §§ 4.3, 4.7, and 4.21. *See* R-1-7; 18 Vet.App. 440, 443-45 (2004). Under 38 C.F.R. § 4.21, a veteran is not required to demonstrate all the symptoms enumerated under a specific rating. This is particularly true of disabilities that are rated by analogy, such as Mr. Keels' headaches. Neither the rating criteria nor the Court have defined the term prostration. *See* 38 C.F.R. § 4.124a. Although the June 2012 VA examiner opined that the Veteran did not suffer from prostrating attacks of headache pain, the Board could not unquestionably adopt this opinion as its own. R-162-63; *see Gabrielson v. Brown*, 7 Vet.App. 36, 40 (1994). Instead, the ultimate determination as to whether or not Mr. Keels' headaches were prostrating must be made by the Board through its own analysis. *See Moore v. Nicholson*, 21 Vet.App. 211, 218 (2007). Irrespective of the Board's lack of discussion of *Pierce* or the relevant regulations, the Secretary does not contest the Veteran's argument that the Board failed to conduct its own analysis to support its conclusion that the Veteran's headaches were not prostrating. *See* Sec. Br. at 14-21; Apa. Open Br. at 9-10. Thus, the Court may assume that the Secretary concedes this point. *See MacWhorter v. Derwinski*, 2 Vet.App. 133, 136 (1992) (Court noting that where the Secretary fails to respond appropriately, "the Court deems itself free to assume, and does conclude, the

points raised by appellant, and ignored by the General Counsel, to be conceded”).

The Secretary avers that the Appellant’s reliance on the 2012 neurological examination report was misplaced because “the report was plainly unfavorable to [the Veteran’s] claim.” Sec. Br. at 17. He claims that because the Veteran denied experiencing prostrating attacks of headache pain, the Veteran’s reliance on the examination report is misplaced. Sec. Br. at 15, 17. However, as noted above, the term prostration is not clearly defined by the regulations, case law, or rating criteria. *See* R-5. The Board simply “recognize[d]” a definition from a medical dictionary stating that prostration is “extreme exhaustion or powerlessness[,]” but did not describe what symptomatology such a standard entails. *Id.*

Therefore, due to the lack of clarity regarding what exactly prostration entails, the Secretary is incorrect in arguing that the report was “plainly unfavorable” to the Veteran because it is unclear what standard is applied. *Cf.* Sec. Br. at 17. Even accepting that the Veteran denied prostrating attacks in his examination, it is unclear if the Veteran used the same standard as the Board to determine what constitutes prostrating. R-162-63.

Additionally, the Secretary argues that the June 2012 examination was adequate to inform the Board as to the examiner’s “judgment on a medical question.” Sec. Br. at 23. However, he concedes that the examiner’s notation regarding prostration was simply a documentation of the Veteran’s reporting of his condition. Sec. Br. at 21-22. Accordingly, the information regarding prostration is *not* based on the examiner’s

medical judgment, but instead on the report of the Veteran based on an unspecified interpretation of the unclearly defined term of prostration. *See id.*; R-5. Therefore, reading the examination report as a whole, the Secretary's assertion that the examination was adequate is unpersuasive. Sec. Br. at 22.

The Secretary further argues that “the record contains additional medical evidence to support the Board’s non-prostrating determination in other VAMC visits[.]” Sec. Br. at 18. The treatment notes from September 2007, September 2009, July 2010, and August 2010, that he relies on discuss specific symptoms the Veteran did and did not experience, as well as two instances where the Veteran did not experience headaches. *Id.* While these treatment notes do not preclude a Board finding of prostration, the Board also failed to consider them in its analysis. *See* R-16 (Board relied on the June 2012 examination report as well as July 2012 and October 2013 treatment notes). Thus, the Secretary’s argument is simply a *post hoc* evaluation of the evidence in lieu of a proper assessment by the Board. *See Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000) (noting “the general rule that appellate tribunals are not appropriate fora for initial fact finding”); *see also Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 156 (1991) (“[L]itigating positions’ are not entitled to deference when they are merely appellate counsel’s ‘post hoc rationalizations’ for agency action, advanced for the first time in the reviewing court”).

II. The Board erred when it failed to discuss the issue of severe economic inadaptability, and § 4.7 is applicable to the Veteran's claim.

The Secretary concedes that the Board failed to discuss the issue of severe economic inadaptability, but argues the Board was not required to do so. Sec. Br. at

19. The Secretary relied on *Tatum v. Shinseki*, 23 Vet.App. 152, 156 to assert:

Here, for a 10% disability rating under DC 8100 . . . 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 [under DC 8100] is included in the higher disability rating, DC 8100 employs successive rating criteria making § 4.7 not applicable to the Veteran's claim[.]*

Sec. Br. at 19-20 (emphasis added). The Secretary misinterprets *Tatum* and this assertion is contrary to law. *See* 23 Vet.App. at 156.

In *Tatum*, the Court considered the applicability of an increased rating under DC 7903. *Id.* A 10% rating under this DC “requires only fatigability[.]” and a 30% rating requires three criteria, including fatigability. *Id.* There, the veteran experienced fatigability as well as another symptom enumerated within the 30% criteria. *Id.* The Court concluded that this raised the issue of whether a 30% rating was more appropriate, and “[a]ccordingly, § 4.7 [was] implicated in this case.” *Id.* Judicial review was frustrated because the Board erroneously required all three symptoms enumerated within the 30% rating criteria for that rating to be warranted, thereby failing to “consider whether the effects of [the veteran’s] disability warranted a 30% rating under § 4.7[.]” *Id.* The Court distinguished DC 7903, which “does not involve

successive rating criteria[,]" from DC 7913, which does. *Id.* at 155-56. The Court noted that DC 7913 involves successive ratings because:

a 10% disability rating is warranted when the veteran's diabetes are "manageable by restricted diet only," a 20% rating where the disability require "insulin *and* restricted diet, or; oral hypoglycemic agent *and* restricted diet;" a 40% rating where the diabetes require "insulin, restricted diet, *and* regulation of activities;" and a 60% rating requires "insulin, restricted diet, *and* regulation of activities with episodes of ketoacidosis or hypoglycemic reactions."

Id. (emphasis added).

In Mr. Keels' case, like the DC considered in *Tatum*, the rating criteria is not successive. 23 Vet.App. at 156; *cf.* Sec. Br. at 20. For example, a 10% rating under DC 8100 requires infrequent prostrating attacks, while a 30% disability rating requires frequent prostrating attacks – not infrequent prostrating attacks *and* a separate symptom. Thus, the Secretary's reliance on *Tatum* to assert that § 4.7 is not applicable to the rating criteria misinterprets the law. *See* 23 Vet.App. at 155-56; Sec. Br. at 19-20. Moreover, *Pierce* specifically contemplated the issue of entitlement to an increased rating under DC 8100 and held that the Board erred when it "failed to address specifically the application of the interplay" between §§ 4.3, 4.21, *and* 4.7. 18 Vet.App. at 443-45. Although the VA examiner opined that the Veteran's headaches did not render him "unemployable[,]" the Veteran did not have to exhibit complete unemployability for his headaches to be capable of producing severe economic inadaptability; rather a lower standard is implied, although the Board erred in failing to

discuss this issue due to its inadequate earlier analysis. R-164; *See* R-6-7; *Pierce*, 18 Vet.App. at 446. Remand is warranted for the Board to provide an adequate analysis.

III. The collective impact of the Veteran’s multiple service-connected disabilities was reasonably raised by the record.

In addition to his headaches, which are secondary to eye trauma, Mr. Keels is also service-connected for left eye ptosis, which caused difficulty keeping his left eyelid open. *See* R-3031; *American Society of Ophthalmic Plastic & Reconstructive Surgery*, <http://www.asoprs.org/i4a/pages/index.cfm?pageid=3669>, (last accessed September 15, 2016). While Mr. Keels’ left eye had trouble remaining open, he developed headaches and burning eye pain when his eye was exposed to light. *See* R-161; R-3031. Thus, Mr. Keels experienced difficulty regulating the openness of his left eyelid, but an open left eye caused him pain. The Board failed to analyze whether the Veteran’s individual schedular ratings contemplated these combined effects. *See* R-7.

The Secretary argues that “because [the Veteran’s] headaches are service-connected *secondary* to his eye trauma, he is already compensated for his eye/headaches symptomatology.” Sec. Br. at 26. He reasons that “the Board specifically noted [Mr. Keels] ‘service-connected headaches are the result of light exposure to his light sensitive eye and manifest in nonradiating burning pain around the eye[.]’” *Id.*

Simply because the Veteran’s ptosis and headaches are both secondary to his in-service left eye trauma does not mean that he is already compensated for their

collective impact. *Cf. id.*; *see* R-1750-51 (1996 rating decision granting service connection for ptosis as secondary to left eye trauma). The procedural history of the Veteran's claim reveals that his ptosis and his headaches are two *separate* disabilities, and are rated separately:

[T]he RO granted service connection for [the Veteran's] eye disability (diagnosed as ptosis, and claimed as muscle weakness of the left eye). In March 1996, the RO granted service connection for headaches secondary to eye trauma sustained in service; the RO then explained that the [V]eteran suffered [a] left eye injury in December 1975, and the injury appeared to have caused the [V]eteran photophobia, which in turn triggered headaches.

R-1099 (1095-1107) (July 2003 Board decision); *see* R-44 (40-45) (July 2014 rating decision). The fact that each condition is separately service-connected does not preclude the issue of combined impact from being reasonably raised by the record. *See Johnson v. McDonald*, 762 F.3d 1362, 1366 (Fed. Cir. 2014) (“[l]imiting referral for extra-schedular evaluation to considering a veteran’s disabilities individually ignores the compounding negative effects that each individual disability may have on the veteran’s other disabilities”). Thus, the Secretary’s position is meritless and remand is warranted. *See Geib v. Shinseki*, 733 F.3d 1350, 1354 (Fed. Cir. 2013) (Where the Board does not address “the aggregate effect of multiple service-connected disabilities, the record is not adequate to enable the veteran to understand the precise basis for the decision [or to] facilitate review”).

CONCLUSION

The Board erred when it misinterpreted the law, relied on an inadequate examination, and provided inadequate reasons or bases for its decision. Based on the foregoing reasons, as well as the arguments contained in Mr. Keels' opening brief, the Court should vacate the Board's decision and remand the appeal with instructions to readjudicate the issue of Mr. Keels' entitlement to an increased rating for his headaches, to include on an extraschedular basis, in accordance with the Court's opinion.

Respectfully Submitted,

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