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

NO. 15-1560

ELY R. ACOSTA, APPELLANT,

V.

ROBERT A. McDONALD,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before HAGEL, *Chief Judge*.

**MEMORANDUM DECISION**

*Note: Pursuant to U.S. Vet. App. R. 30 (a),  
this action may not be cited as precedent.*

HAGEL, *Chief Judge*: Ely R. Acosta appeals through counsel an April 8, 2015, Board of Veterans' Appeals (Board) decision that denied entitlement to a disability rating in excess of 30% for headaches for the period prior to November 1, 2009.<sup>1</sup> Mr. Acosta's Notice of Appeal was timely, and the Court has jurisdiction to review the Board decision pursuant to 38 U.S.C. § 7252(a). The parties neither requested oral argument nor identified issues that they believe require a precedential decision of the Court. Because the Secretary concedes, and the Court agrees, that the Board provided inadequate reasons or bases for its determination, the Court will vacate that part of the April 2015 Board decision that denied Mr. Acosta a disability rating in excess of 30% for headaches prior to

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<sup>1</sup> The Board also granted Mr. Acosta a 50% disability rating for headaches along with his request for a total disability rating based on individual unemployability, both from November 1, 2009. Because this portion of the Board's decision is favorable to Mr. Acosta, the Court may not address this issue. *See Hibbard v. West*, 13 Vet.App. 546, 549 (2000) (per curiam order) (stating that the Court's jurisdiction is statutorily limited to appeals of final Board decisions that are adverse to the claimant). The Board also denied increased disability ratings for lumbar spine degenerative joint disease and degenerative disc disease. Because Mr. Acosta makes no arguments related to that claim in his opening brief, the Court deems any appeal of those matters abandoned. *See Grivois v. Brown*, 6 Vet.App. 136, 138 (1994) (holding that issues or claims not argued on appeal are considered abandoned).

November 1, 2009, and remand the matter for further development and readjudication consistent with this decision.

## **I. FACTS**

Mr. Acosta served on active duty in the U.S. Navy from August 1989 to March 1995. Record (R.) at 74.

In February 1997, Mr. Acosta filed a claim for VA disability benefits for headaches. That same month, a VA regional office denied his claim. He filed a timely Notice of Disagreement with that decision and thereafter perfected his appeal to the Board.

In April 1998, he underwent a VA medical examination during which he reported that he had a ten-year history of headaches occurring at least twice each week, which at times were associated with nausea and vomiting, and some of which were so severe that he had to leave work early or was unable to work at all.

In February 2001, the Board issued a decision remanding Mr. Acosta's claim to the regional office for a VA medical examination, addressing the etiology of his claimed headaches.

In April 2002, Mr. Acosta underwent the requested VA medical examination in which he reported two to three headaches each month with occasional nausea and stated that he had to miss work two to three times each month as a result of his headaches.

In September 2003, Mr. Acosta underwent a VA neurology examination administered by Allam Morales, M.D., at which Mr. Acosta reported that he had missed two or three days of work when he had severe pain during headaches.

In May 2004, Mr. Acosta underwent a VA medical examination wherein the VA examiner opined that he suffered from "chronic tension type headaches with occasional intense exacerbations two to three times per month." R. at 857.

In February 2005, the Board denied VA disability benefits for headaches. Mr. Acosta appealed this decision to this Court and the parties entered into a joint motion for partial remand on the basis that the Board provided inadequate reasons or bases for parts of its decision.

In March 2007, the Board granted Mr. Acosta VA disability benefits for headaches.

In November 2008, the regional office assigned Mr. Acosta a 30% disability rating for his headaches, effective February 13, 1997.

In February 2009, the regional office denied Mr. Acosta's request for a total disability rating based on individual unemployability. Thereafter, Mr. Acosta timely filed a Notice of Disagreement with the initial disability rating assigned for his headaches and the denial of a total disability rating based on individual unemployability.

In July 2012, Mr. Acosta underwent a VA medical examination administered by Kenneth Myers, M.D., to address the severity of his headaches. Dr. Myers noted that Mr. Acosta experienced headaches and nausea that required him to "lie down for a few hours each time and sometimes lasting into the next day." R. at 333-34. Dr. Myers also noted that prostrating headaches occurred "more frequently than once per month" and that Mr. Acosta experienced very frequent prostrating and prolonged attacks of migraine headache pain. R. at 335.

In April 2015, the Board issued the decision on appeal, denying Mr. Acosta entitlement to a disability rating in excess of 30% for headaches prior to November 1, 2009, because it found that for the period from February 13, 1997, to October 31, 2009, Mr. Acosta's headaches "were manifested by prostrating attacks occurring less than once a month." R. at 3. This appeal followed.

## **II. ANALYSIS**

### **A. Headache Claim**

In rendering its decision, the Board is required to provide a written statement of the reasons or bases for its "findings and conclusions[ ] on all material issues of fact and law presented on the record." 38 U.S.C. § 7104(d)(1). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

On appeal, Mr. Acosta argues that the Board provided inadequate reasons or bases for its assignment of a 30% disability rating for his headaches prior to November 1, 2009. Specifically, Mr. Acosta argues that the Board: (1) conflated the criterion of Diagnostic Code 8100 that requires

"severe economic inadaptability" with "unemployment"; (2) failed to adequately address and consider evidence relating to the effects of his headaches on his employment; and (3) failed to properly consider pertinent and favorable evidence with regard to the frequency and severity of his headaches. Appellant's Brief (Br.) at 6.

The Secretary concedes that the Court should remand the Board's decision because it was not supported by an adequate statement of reasons or bases and the Board "failed to properly apply the law regarding 38 C.F.R. § 4.124a, Diagnostic Code 8100." Secretary's Br. at 3. In particular, the Secretary concedes that the Board conflated the schedular diagnostic criteria for a 50% evaluation for headaches with the standard for a total disability rating based on individual unemployability. *Id.* at 5; *see also Pierce v. Principi*, 18 Vet.App. 440, 446 (2004) (noting that nothing in Diagnostic Code 8100 requires that the claimant be completely unable to work to qualify for a 50% evaluation).

A review of the record supports the arguments and concessions made above. The Board clearly noted that Mr. Acosta worked full time until October 31, 2009, and therefore found that, "from November 1, 2009, (*the day after [Mr. Acosta] last worked full time*), the record demonstrates a factually ascertainable increase in severity to severe economic inadaptability from the migraines, warranting a 50[%] rating under Diagnostic Code 8100." R. at 10 (emphasis added). Nothing in the rating schedule requires unemployability to find that a 50% rating is warranted. Accordingly, the Court finds that remand is warranted.

On remand, Mr. Acosta is free to submit additional evidence and argument in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). "A remand is meant to entail a critical examination of the justification for the decision" by the Board. *Fletcher v. Derwinski*, 1 Vet.App. 394, 397 (1991). In addition, the Board shall proceed expeditiously, in accordance with 38 U.S.C. § 7112 (expedited treatment of remanded claims).

#### B. Extraschedular Consideration

Although the Court has already determined that remand is necessary, the Court will nevertheless address Mr. Acosta's remaining arguments regarding extraschedular consideration. *See Quirin v. Shinseki*, 22 Vet.App. 390, 396 (2009) (holding that, to provide guidance to the Board, the Court may address an appellant's other arguments after determining that remand is warranted). Mr.

Acosta argues that the Board failed to adequately consider whether the "level of severity" of his symptoms warranted extraschedular consideration. Appellant's Br. at 6. The Secretary concedes that the issue of entitlement to an extraschedular evaluation for headaches should also be considered upon remand as it is inextricably intertwined with Mr. Acosta's claim for an increased rating for his headaches. Secretary's Br. at 7.

Where a decision on one claim would have a "significant impact" on another claim, and where that impact could render the Court's review of the other claim meaningless or a waste of judicial resources, the claims are inextricably intertwined. *Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991), *overruled on other grounds by Tyrues v. Shinseki*, 23 Vet.App. 166, 186 (2009) (en banc), *aff'd*, 631 F.3d 1380 (Fed. Cir. 2011), *vacated and remanded*, 132 S. Ct. 75 (2001); *see also Smith v. Gober*, 236 F.3d 1370, 1372 (Fed. Cir. 2001) (holding that, where the facts underlying two claims are "intimately connected," the interests of judicial economy and of avoiding piecemeal litigation require that the claims be appealed together).

The Board considered whether a referral for consideration of an extraschedular disability rating was warranted in the context of Mr. Acosta's lumbar spine disability and headaches. R. at 20. Because the Board remanded Mr. Acosta's claim for an increased disability rating for a lumbar spine disability, which will necessarily affect the extraschedular analysis, remand is warranted. *See Johnson v. McDonald*, 762 F.3d 1362, 1365 (Fed. Cir. 2014) (holding that when multiple service-connected disabilities are presented, referral for extraschedular consideration is based on the collective impact of those disabilities); *Yancy v. McDonald*, 27 Vet.App. 484, 495 (2016) (holding that the Board is required to address whether referral for extraschedular consideration is warranted for a veteran's disabilities on a collective basis when that issue is argued by the claimant or reasonably raised by the record through evidence of the collective impact of the claimant's service-connected disabilities).

Moreover, the Court has previously held that an increased rating claim is inextricably intertwined with an extraschedular rating claim. *See Bagwell v. Brown*, 9 Vet.App. 337, 339-40 (1996); *Floyd v. Brown*, 9 Vet.App. 88, 96 (1996) (stating that extraschedular rating consideration is "always part" of a claim for an increased schedular rating). As such, remanding the issue of extraschedular consideration is also warranted in this regard.

### **III. CONCLUSION**

Upon consideration of the foregoing, the Board's April 8, 2015, decision is VACATED and the matter is REMANDED for further development and readjudication consistent with this decision.

DATED: July 28, 2016

Copies to:

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