

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

STEPHEN M. BROWN, Appellant

v.

ROBERT L. WILKIE, SECRETARY OF VETERANS AFFAIRS, Appellee

Vet. App. No. 19-0127

BRIEF FOR APPELLANT

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## INTRODUCTION

The Appellant, Stephen M. Brown, hereinafter “the Appellant” or the “Veteran”, submits to the United States Court of Veterans Claims, “Court” or “CAVC” the initial brief of the Appellant.

In doing so, the Appellant relies on the Record Before the Agency filed herein on on about April 10, 2019, referred to as (R.at 1)”

The appeal to this Court is taken from the decision of the Board of Veterans Appeals (“BVA” or “Board”) Docket No. 10-40 654A decided on November 5, 2018. Therein the Board denied the Appellant’s appeal seeking a starting date earlier than May 13, 2015 for the Appellant’s service-connected headaches, rated as 50% disabling.

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## STATEMENT OF THE ISSUES

- I. Whether the Board of Veterans Appeals determination that the earliest factually ascertainable date for assignment of a 50 percent rating for headaches is May 13, 2015 is clearly erroneous and must be changed to an earlier, appropriate date.
- II. Whether the Board of Veterans Appeals erred by failing to find that the Appellant was entitled to an increase in special monthly compensation due to his 50% service connected rating for headaches in accordance with 38 CFR 3.50(f)(3).

## STATEMENT OF THE CASE

The “Appellant”, Stephen M. Brown, appeals from the denial by the Board of Veterans Appeals on November 5, 2018 of his claim for an earlier effective date than May 13, 2015 for his 50% rating for service connected headaches and the BVA failure to address his claim for an increase in special monthly compensation due to that 50% rating.

## STATEMENT OF THE FACTS

The Appellant served on active duty in the U.S. Air Force between June 1971 and September 1993 when he retired. His military service gave rise to significant service-connected disabilities. His cognitive disorder was rated as 100% disabling, effective July 22, 2005 (R 5796). He is entitled to TDIU effective April 17, 2000 (R9278).

Among his other service-connected disabilities is a 40 % rating for degenerative joint disease (R9316), SMC based on aid and attendance (R4823), starting August 6, 2009 and headaches rated 50 % disabling effective May 13, 2013. In this appeal, an earlier effective date for this rating is sought.

The Appellant contends that his problems with headaches began while he was in service. In particular, he attributes his injuries in a motorcycle accident in 1979 to the headaches and other disabilities. There are many credible observations by medical personnel, in service and in the VA reporting that he suffered from headaches. His roommate, William Worl, at Grissom AFB in 1992, a trained medic, explained that during the 5 ½ months he and the Appellant lived in the same house, the Appellant had terrible migraine headaches almost daily which happened after his neck started hurting. (R1700).

The record points to the 1979 motorcycle accident as the catalyst for several medical problems that later were identified as service-connected disabilities. As the BVA acknowledged, the occurrence of the accident is well documented. (R2358) It formed the basis for the Appellant's claim for service- connected benefits which was filed on October 19, 2000. (R 10242) In the claim letter, he stated: "...request compensation for Head injury which occurred at Wright Patterson Air Force Base, Ohio in 1979 and all secondary and tertiary conditions thereto." See also, the Appellant's letter dated April 27, 2000, claiming entitlement to compensation for "spinal degeneration with secondary conditions." (R10615) The VA did not assist Captain Brown in identifying his headaches as a service-connected medical condition that was secondary to his degenerative joint disease, cervical spine with a history of

myofascial pain in the cervical spine or trapezius and sinusitis. If they had done so, it could have prompted the veteran to file a claim in for the headaches in 1993.

The accident and the problem of headaches were repeatedly referred to in his service medical records and in VA medical examinations. The medical reports discussed his motorcycle accident as an event that may have contributed to his service-connected conditions including headaches. Examples include; a C&P exam in 1996 (R3550), a C&P exam in 2000 (R 3462), and a rating decision in 1994 ( R1410) , a rating decision in 1999 (R10928); a 1999 C&P exam (R 10946), a psychologist's report in 1996 (R10584) and a medical report in 1998 (R11002). Also, see the Appellant's notes regarding the headaches. (R11359).

The BVA decision dated November 5, 2018, states: "in May 2007, the Veteran asserted - for the first time –that he had incurred an in-service head injury at the time of a motorcycle accident which caused or contributed to his current headaches." (R11) The Appellant contends that this is clearly erroneous. See his "Pain Questionnaire" dated December 16, 2000 which states his pain started in 1979 when he had a motorcycle accident and that the pains in his neck worsened gradually over time and "causes headaches." (R1728) The BVA also states in that none of the Veteran's assertions to VA examiners in 2007 and August 2016 concerning what happened at the time of the motorcycle accident are credible. The Appellant contends this is likewise, clearly erroneous. See reports of Dr. Smith in 2005 (R1731) and Dr. Vigor whose report in May 2007, stated the Appellant had "chronic headache and neck pain." (R. 1650 –55)

A Rating Decision dated October 9, 2007, had concluded that the Appellant's headaches were service-connected, but rated them as 0% disabling. This began a



period of many years in which VA refused to take action on Captain Brown's headache claim. He responded by filing a Notice of Disagreement (NOD) on October 27, 2007 challenging the 0% rating. (R 7890). VARO took no action. Its letter dated December 11, 2007 states: "Unfortunately, we cannot accept your statement as a Notice of Disagreement as a final decision with regard to your claim has not been rendered. (R7852)

The veteran filed a Petition for Extraordinary Relief in this Court on July 9, 2010 in CAVC No. 10-2269 seeking to compel the issuance of a Statement of the Case. (R.6523) The Court's order of September 2, 2010, required VA to required VA to file an update on proceedings by September 28, 2010 and every 7 days thereafter until the RO had issued a a SOC or the DRO had issued a decision. A SOC was issued on September 26, 2010. (R6580). Thereafter, the petition was dismissed as moot. The Appellant filed a timely appeal of the SOC on October 10, 2010 (R. 6473).

On 31 January 2012, the BVA. found: " In October 2007 and August 2008, the Veteran filed notices of disagreement with rating decisions denying claims for entitlement to an increased initial rating for headaches and an earlier effective date for the award of special monthly compensation based on housebound status, respectively. As the Veteran has not been provided a SOC in response to the notices of disagreement, a remand is required for the issuance of a SOC on these issues." The remand order required VARO to readjudicate the claims on appeal and if benefits sought were not granted to issue a Supplemental Statement of the case. (R. 6090-6004)

There was relative inactivity at the VARO in carrying out the remand order until a Supplemental Statement of the Case was issued on June 25, 2013. (R.5832) The SSOC

sought to continue the 0% rating for headaches. The veteran responded to the SSOC on July 25, 2013 (R. 5533) and July 26, 2013. (R. 5528) Additional evidence was submitted. (R5497) An appeal to the BVA challenged the SSOC. ( 5498 – 5502) The appeal resulted in a remand order dated May 13, 2015 (R. 4823 – 25) directing that the veteran be examined for headaches because the BVA observed that there had been no such examination since May 2007. (R. 4823)

The examination by Dr. Kountanis pursuant to the remand order formed the basis for an increased rating of 50% for headaches, effective on May 13, 2015. (R. 1777). The veteran appealed to the BVA for an earlier effective date. The Board determined in its March 8, 2017 decision that the claim for headaches might have a significant impact on the veteran's SMC claim. (R1610). The matter was again remanded to VARO Detroit for readjudication. The claim for an earlier effective date was denied. (R. 1631) (R1631) The veteran filed a NOD (R97) on June 6, 2018 and appealed to the BVA on June 11, 2018. (R102).

A Decision Review Officer issued a Deferred Rating Decision on July 9, 2018 addressing the Appellant's June 6, 2018 NOD. (R95) He stated that the effective date for the 50% evaluation for headaches was already on appeal and added: "we need to send the vet a letter telling him the NOD is invalid...and telling him that we need an actual claim for the issue of entitlement to a higher level of SMC." The Appellant has not received the letter referred to by the DRO.

On November 5, 2018, the BVA denied the Appellant's request for an effective date earlier than May 13, 2015 for the 50% rating for headaches. The decision did not address the Appellant's claim for entitlement of a higher level of SMC. The Appellant

filed a Motion to Vacate with the BVA. The BVA denied the Motion on April 4, 2019, stating that the BVA lacked jurisdiction to consider the issue of entitlement to a higher level of SMC. The Appellant applied to the VA in May 2019 for that benefit.

The November 5, 2018 BVA decision is the subject of this Appeal.

## ARGUMENT

### I

**Stephen M. Brown is entitled to an effective date earlier than May 13, 2015 for his 50% rating for headaches.** 38 U.S.C. 5110 states as follows: “Unless specifically provided otherwise in this chapter, the effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for an increase of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.” The implementing regulation, 38 CFR 3.400 states the general rule that the effective date will be the date of receipt of the claim or the date entitlement arose, which ever is later.

The facts found clearly show that the Appellant’s entitlement to compensation for headaches arose while he was on active duty in the Air Force. In spite of the BVA’s decision to the contrary, the evidence of his motorcycle accident, doctors opinions and the statement of William Worl clearly show that the headaches (and accordingly his entitlement) arose, before his retirement from the Air Force. This case is not similar *Sears v. Principi*, 349 F. 3d 1326 (Fed Cir 2003) where the Appellant’s claim was finally denied. In the present case, the veteran continued to appeal the 0% rating and the

effective date of that rating. The delay in processing his claim was caused by VARO.

There is no connection between the date of the claim and May 13, 2015. It was deemed to be the starting date for his 50% rating for headaches based on the unsupported notion that his headaches had increased in 2015. His claim for service-connection for headaches is no later than April 27, 2000 (R10614) or October 19, 2000. (R 10242). On these dates he wrote to VA claiming benefits for the medical conditions caused by his motorcycle accident.

Alternatively, the appropriate date for the start of the service connected headaches is the date he retired from service, October 1, 1993. Captain Brown did not specifically claim headaches on his VA Form 21-4138 when he retired from service. He did cite “cervical spinal injury/myositis” beginning in September 1979 (due to the motorcycle accident) and “acute chronic sinusitis/rhinitis” beginning in July 1971 as service-connected disabilities for which benefits were claimed. Headaches should have been viewed as secondary to those conditions. They reasonably should be viewed as original service-connected conditions in accordance with 38 CFR 3.310(a). The starting dates for the original and secondary conditions should be the same. Also, the VA should have should have assisted the veteran in perfecting his claim for headaches in accordance with 38 U.S.C. 5103A (a) and (d). If they had they done so, his claim for benefits for with headaches would have been filed in 1993.

## II

**The Board of Veterans Appeals decision was clearly erroneous in ruling that the Appellant was not entitled to an earlier starting date for the headaches.**

The BVA decided that “contrary to his lay assertions” prior to May 13, 2015,

the Appellant's service-connected headaches were manifested by less frequent attacks. (R. 8). The weight of medical evidence supports the view that the BVA is simply wrong in its findings with regard to the veteran's headaches. Dr. Vigor's medical opinion in a May 2007 C&P exam described the veteran's headaches as "chronic headache and neck pain" (R 1655). This does not support the BVA's conclusion. Neither does the medical opinion of Dr. Rao who performed a C&P examination in 2009. In the report he stated: "Despite the documented history of traumatic brain syndrome and secondary cognitive dysfunction with short term memory loss and hx of chronic neck and shoulder pain with recurrent headaches, it is verified that he does all of his activities of daily living with no assistance." (R 4458) The doctor went on to recommend the Appellant be awarded SMC based on aid and attendance.

The other evidence in the file shows convincingly that the BVA either purposely or arbitrarily disregarded evidence favorable to Captain Brown. The following are some of the reports that contradict Judge Feinberg's conclusions. Dr. Stern in 1998 reported "some headaches, sometimes severe." (R 3366) A 1994 rating decision provided evidence of degenerative joint disease that possibly was due to the motorcycle accident. (R 1410).

The BVA decision states that the Appellant's statements about a motorcycle accident are not credible. Judge Feinberg argues that the Appellant, "for the first time" in 2007 asserted is motorcycle accident caused or contributed to his headaches. This observation is simply false. A "Pain Questionnaire" prepared by the veteran in December 2000 explained that the motor cycle accident resulted in pains to the neck and back that caused headaches. (R 1685). At about that same time, the Appellant's Rehabilitation

Counselor provided a detailed explanation of the long term effects of the Appellant's head injury suffered in the accident. He stated: "In my opinion, I believe there is enough evidence to conclude that Mr. Brown may have a legitimate claim for residuals of head injury. I submit this opinion based on my 4 years of employment experience with the National Head Injury program. After working with the veteran for the past 10 months, I can't help but believe that the majority of his problems are the long-term results of this injury and the absence of professional rehabilitative treatment following." (R 1054)

The evidence compels the conclusion that the BVA decision to deny an earlier effective date for Stephen M. Brown's headaches was clearly erroneous. The determination and the effective date a disability rating are factual findings the Court reviews under the clearly erroneous standard. *Johnston v. Brown*, 10 Vet. App. 80 (1997). In accordance with the statute, the effective date should be fixed in accordance with the facts found, but not earlier than the date of application therefor. The facts found in this matter strongly support the conclusion that the Appellant's headaches were a product of his head injury while riding a motorcycle in 1979 while he was of active duty. In analyzing the facts found in this or any other case, the date the evidence was submitted is irrelevant. *McGrath v. Gober*, 14 Vet. App. 28 (2000). The Appellant urges to Court to direct the VA to assign his service-connected disability for headaches on October 19, 2000 or, alternatively, on October 1, 1993.

### CONCLUSION

Stephen M. Brown respectfully requests the Court to grant his appeal and direct the VA assign an effective date of October 1, 1993 for his service-connected headaches rated as 50% disabling. He also requests his application for increased SMC based on aid

and attendance to be remanded to the VA for prompt action.

Submitted this 21st day of June, 2019.

/s/ Michael J. Malone

Michael J. Malone, Attorney

