Vet.App. No. 19-0127

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

STEPHEN M. BROWN
Appellant,

v.

ROBERT L. WILKIE
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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BRIEF OF THE APPELLEE
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I. ISSUE PRESENTED

Whether the Court should affirm the Board of Veterans' Appeals' (Board) November 5, 2018, decision which denied entitlement to an effective date prior to May, 13, 2015, for a 50% rating for headaches, where the Board's findings are plausibly based on the evidence of record, other Department of Veterans Affairs (VA) statutes and current regulations, and case law, as well as an adequate statement of reasons or bases.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction over this appeal pursuant to 38 U.S.C. § 7252(a).

B. Nature of the Case

On November 5, 2018, the Board issued the decision on appeal, denying Mr. Stephen M. Brown (Appellant) entitlement to an effective date prior to May 13, 2015, for a 50% evaluation for headaches. [Record Before the Agency (R.) at 3-17].

Appellant does not challenge the Board's denial of an effective date prior to July 22, 2005, for a grant of special monthly compensation (SMC) at the housebound rate, or an effective date prior to April 17, 2000, for a grant of a total disability rating based on individual unemployability (TDIU). While under his statement of issues and conclusion sections, Appellant requests that the Court remand the issue of whether he is entitled to an earlier entitlement date for SMC, [Appellant's Brief (App. Br.) at 3, 11-12], he presents no argument or further statements regarding SMC in his brief. *See* App. Br. at 3-12. Indeed, the only reference to any evidence pertaining to his ability to perform activities of daily living is from an October 2009 VA examination, in which the examiner wrote:

> From aid attendance (sic) aspect he lives alone in home, does all activities of daily living including dressing, shaving, showering, toileting and attending to the wants of nature with no assistance. Drives alone with no restrictions. Does home telecommunication, watches TV, does video games, occasionally walks and bikes alone and occasionally fishes.
> . . .
>
> [I]t is verified that he does all of his activit[i]es of daily living with no assistance.

[R. at 4457-58 (4455-59)]; *see* App. Br. at 10. Appellant also makes no argument as to the Board's denial of an earlier effective date for his award of TDIU. *See* App. Br. at 3-12. Thus, the Secretary asserts that he has abandoned these claims on appeal, and the Court should dismiss his appeal thereof. *Pederson v. McDonald,* 27 Vet.App. 276, 283 (2015) (en banc) (stating that "this Court, like other courts, will generally decline to exercise its authority to address an issue not raised by an appellant in his or her opening brief."); *Cacciola v. Gibson*, 27 Vet.App. 45, 47 (2014) (holding that when Appellant expressly abandons an appealed issue or declines to present arguments as to that issue, Appellant relinquishes the right to judicial review of that issue and the Court will not decide it); *Grivois v. Brown*, 6 Vet.App. 136, 138 (1994) (holding that issues or claims not argued on appeal are considered abandoned).

Ostensibly, Appellant does not present any clear legal arguments in his brief, but instead presents a string of factual citations related to his headaches without ties to legal analysis or further thoughts on effective dates in general. Further, it is unclear if Appellant is challenging the original effective date for service connection for headaches, May 7, 2007, or the effective date for his 50% evaluation, May 13, 2015, based this string of factual citations. Thus, the Secretary asserts that Appellant has failed to meet his burden on appeal. *See Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (Appellant bears the burden of demonstrating prejudicial error); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that Appellant bears the burden of demonstrating error on appeal), *aff'd* 232 F.3d 908

(Fed. Cir. 2000). Nevertheless, to provide the Court with clarity, the Secretary will provide a liberal reading to his statement of facts and address both of these arguments for benefit of the Court despite the lack of a clear or cohesive theory of entitlement from Appellant.

C. Statement of Facts and Procedural History

As Appellant has limited his arguments to only the issue of entitlement to an effective date earlier than May 13, 2015, for the award of a 50% disability rating for his service-connected headaches, the Secretary will limit his recitation of facts to that claim.

Appellant served in the United States Marines from June 16, 1971, to December 5, 1974, from May 3, 1979 to February 29, 1992, and from March 2, 1992 to September 30, 1993. [R. at 2607-09]. Service treatment records (STRs) from September 1979 show that Appellant fell off a motorcycle while trail riding and suffered a strained neck because of the accident. [R. at 2358]. STRs from July 1993 show that Appellant reported that he did not have any headache symptoms. [R. at 2370-71].

In a March 25, 1999, VA examination, Appellant reported he began experiencing headaches concurrently with his sinus infections. [R. at 10946-47]. The examiner diagnosed Appellant with chronic sinusitis. [R. at 10947]. On October 19, 2000, Appellant submitted correspondence requesting compensation for a head injury that occurred in 1979 and "all secondary and/or tertiary conditions thereto." [R. at 10242]. Correspondence from a rehabilitation counselor dated

October 27, 2000, states that Appellant suffered "blunt trauma to his head" after the motorcycle accident in September 1979. [R. at 1053-54].

In a January 2001 private assessment, Appellant reported he had pain in his neck since 1979. [R. at 10303-08]. Appellant denied any headaches since that time. [R. at 10305]. The examiner noted that his assessment was "very limited" as Appellant "hesitates to do any cervical movements because of increase in intensity of pain." [R. at 10307].

In a May 7, 2007, VA examination, Appellant reported that he had "head problems" after a motorcycle accident in 1979. [R. at 8764-65 (8763-68)]. The examiner noted that Appellant had memory problems and personality changes "as a result of the closed head injury," [R. at 8765], and that he had a diagnosis of a cognitive disorder and a personality disorder, [R. at 8768]. The examiner noted that Appellant was taking medication for "headaches and to help control his mood and anxiety." *Id*.

In an October 9, 2007, rating decision, the Regional Office (RO) granted service connection for headaches, rated as noncompensable effective May 7, 2007. [R. at 7946-57]. The RO stated that "[w]e have granted service connection for headaches as being secondary to the veteran's service[-]connected neck condition based on the results of a 5/7/2007 VA Examination at which time the Examiner noted that these conditions were related." [R. at 7950]. On October 27, 2007, Appellant provided a notice of disagreement (NOD) stating "AGREE TO SERVICE CONNECTED HEACHES. THEY OFTEN CAUSE A LAPSE IN

ABILITY TO PERFORM AND SUGGEST A RATING IS INDEED APPROPRIATE GIVEN THE HEACHES IMPEDE LIFE FUNCTIONING." [R. at 7890-97]. Appellant provided another NOD on August 29, 2008, stating that he did not agree with the noncompensable evaluation that had been assigned for his headaches. [R. at 7668-70].

On January 31, 2012, the Board remanded Appellant's claim for an increased rating for headaches for the RO to provide a Statement of the Case (SOC). [R. at 6099 (6090-6106)]. On June 25, 2013, the RO provided an SOC. [R. at 5766-95]. Appellant provided his substantive appeal on July 19, 2013. [R. at 5503].

In correspondence dated August 16, 2013, Appellant reported that he "began experiencing regular severe headaches prior to 2007. They have continued to the present time." [R. at 5497]. On May 13, 2015, the Board remanded Appellant's claim for an increased rating for a headache disability to obtain a contemporary examination. [R. at 4823 (4795-4828)]. In an August 30, 2016, VA examination, Appellant reported that he had headaches one to four times a week and that he was "in bed all the time due to either a headache or anticipation of a headache developing." [R. at 1779 (1777-81)]. In a September 2016, rating decision, the RO increased Appellant's headache evaluation to 50% effective May 13, 2015, "the earliest date it is factually ascertainable that an increase in disability had occurred based on the Board's finding that your headaches have worsened in severity since your May 2007 examination." [R. at 1839 (1831-67)].

On October 21, 2016, Appellant stated that the "effective date for the 50% rating for headaches should be earlier" and also that "0% award for headaches effective May 7, 2007, was wrong." [R. at 1761 (1759-61)]. On March 8, 2017, the Board returned a claim for "entitlement to an effective date earlier than May 13, 2015, for the award of 50 percent evaluation for headaches," to the RO. [R. at 1611, 1630 (1609-33)]. On May 25, 2018, the RO provided a new SOC for the issue of an earlier effective date of 50% prior to May 13, 2015. [R. at 264 (251-304)]. Appellant submitted a NOD on June 6, 2018, [R. at 184-85], and a substantive appeal on June 11, 2018, [R. at 128-30].

The Board issued the decision on appeal on November 5, 2018, finding that an earlier effective date prior to May 13, 2015, for a 50% rating for headaches was not warranted. [R. at 3-21]. Appellant timely appealed the Board's decision on January 4, 2019.

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's November 5, 2018, Board decision because the Board provided adequate reasons or bases and made findings based plausibly on the evidence of record. On appeal, Appellant fails to present any clear legal argument that would conceivably allow him to obtain an earlier effective date for service connection or for a 50% evaluation, let alone persuade the Court that the Board's denial of an effective date earlier than May 13, 2015, for the award of a 50% rating was clearly erroneous. As the Board provided sufficient reasons and

bases and Appellant fails to meet his burden on appeal, the Court should reject Appellant's arguments and affirm the Board's decision.

IV. ARGUMENT

The Board Provided Adequate Reasons or Bases

The substance of Appellant's brief is nothing more than a conglomeration of independent and oftentimes arbitrary statements of fact without any attempt to connect those facts and evidence to a coherent legal argument. His haphazard statements not only preclude thoughtful response but are, at most, underdeveloped and thus not appropriate for judicial consideration. *See Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) ("The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments"); *see also Woehlaert v. Nicholson,* 21 Vet.App. 456, 463 (2007) ("The Court has consistently held that it will not address issues or arguments that counsel fails to adequately develop in his or her opening brief."); *Overton v. Nicholson,* 20 Vet.App. 427, 435 (2006) (the appellant bears the burden of demonstrating error on appeal).

Appellant states that the Board "arbitrarily disregarded evidence favorable to [Appellant]," but fails to tie in any argument with his factual citations, and also fails to present any legal authority that would support his contention that an earlier effective date is warranted. *Appellant's Brief* (App. Br.) at 10; *Chase v. West*, 13 Vet.App. 413, 414 (2000) (per curiam order) (appellant's contention must fail when he does not cite to authority to support it). His brief, which recycles the same

arguments he presented to the Board, baldly asserts that he deserves an effective date earlier than May 13, 2015, for the award of a 50% disability rating for his headache disability. Nevertheless, Appellant does not present any factual basis for an award of an earlier effective date for the award of his increased rating claim, let alone a legal basis to support such an award. Thus, insofar as Appellant has not met his burden, the Secretary respectfully requests that the Court summarily reject Appellant's appeal as he fails to present a developed argument that would warrant remand. *See Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (an appellant's brief must contain an argument and the reasons for it, with citations to the authorities upon which it relied); *see also Leonard v. Principi*, 17 Vet.App. 447, 452-53 (2004) (appellant must support arguments with reasons and cites to supporting authority); U.S. Vet.App. R. 28(a)(5) (requiring that an appellant's brief contain "an argument, beginning with a summary and containing the appellant's contentions with respect to the issues and the reasons for those contentions, with citations to the authorities and pages of the record before the agency");.

As Appellant's brief is mostly comprised of a recitation of variously selected facts from the voluminous record that he submitted to VA during the appeal of this and his other many claims,[1] the Secretary has attempted to discern an argument

1. The Record Before the Agency was over 10,000 pages because, as the Board explained, Appellant "and his attorney continue[d] to submit voluminous duplicative evidence in support of his appeal. This includes resubmitting duplicates [] of medical records from the claims file…" [R. at 7]. Appellant fails to provide citations to support some of his factual statements in the argument portion of the brief,

from Appellant's brief - that the Board failed to provide adequate reasons or bases in finding that an earlier effective date prior to May 13, 2015, for a 50% evaluation. *Breeden v. West,* 13 Vet.App. 250 (2000) (explaining that it is not the responsibility of the Court "to search the record to try to uncover errors not identified by the appellant").

Generally, the effective date of an evaluation and award of compensation or a claim for increase will be the date of receipt of the claim or the date entitlement arose, whichever is the later. 38 U.S.C. § 5110(a) (2012); 38 C.F.R. § 3.400 (2017). Unless otherwise provided, the effective date of compensation will be fixed in accordance with the facts found, but will not be earlier than the date of receipt of the claimant's application. 38 U.S.C. § 5110(a). In a claim for increase, the effective date of an award may be granted prior to the date of claim if it is factually ascertainable that an increase in disability had occurred within one year prior to the date of claim. 38 U.S.C. § 5110(b)(2); 38 C.F.R. §§ 3.400(o)(1)-(2); *see Harper v. Brown*, 10 Vet.App. 125, 126 (1997).

In this case, following the October 2007 rating decision in which the RO granted service connection for headaches effective May 7, 2007, [R. at 7946 (7946-57)], Appellant only appealed the issue of an increased rating claim. *See* [R. at 7890-97 (October 27, 2007, NOD)]; [R. at 7668-70 (August 29, 2008, NOD)]. Thus, to the extent Appellant's arguments are interpreted as requesting

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conceivably because he could not locate the precise location of the records in the claims file, in violation of U.S. Vet.App. R. 28(a)(4); *see* App. Br. at 9-11.

an effective date or an increased rating prior to May 7, 2007, *see* App. Br. at 9, the issue of an effective date prior to May 7, 2007, was never appealed such that the Board did not, and neither does the Court, have jurisdiction over that issue on appeal. *See* 38 U.S.C. § 7105(c) ("If no notice of disagreement is filed in accordance with this chapter within the prescribed period, the action or decision of the agency of original jurisdiction shall become final."); *see also Rudd v. Nicholson,* 20 Vet.App. 296, 300 (2006) (holding there can be no freestanding earlier effective date claim, because allowing such a claim would "vitiate the rule of finality[,]" and dismissing appellant's appeal). And, notably, Appellant makes no argument that would allow revision of the effective date awarded in the October 2007 rating decision. *See* App. Br. at 8-12.[2] And, more to the point, the Board did not adjudicate any claim for revision based on Clear and Unmistakable Error (CUE), such that the Court would not have jurisdiction over such a claim even if Appellant had made such an argument. *Russell v. Principi,* 3 Vet.App. 310, 314-15 (holding that a CUE claim cannot be raised for the first time before this Court but that the claim must have been the subject of a final prior BVA adjudication).

Insofar as Appellant did properly appeal the issue of an increased rating claim for headaches, [R. at 7890-97 (October 27, 2007, NOD)], [R. at 7668-70

2. He contradictorily, asserts that the date of service connection for headaches "is no later than April 27, 2000…or October 19, 2000," or "[a]lternatively, … the date he retired from service, October 1, 1993." App. Br. at 9. Again, he provides no legal mechanism or argument for why he believes these are the appropriate effective dates. U.S. Vet.App. R. 28(a)(5).

(August 29, 2008, NOD)], that claim was subsequently granted in a September 2016 rating decision, wherein the RO granted Appellant the highest possible rating for his headaches, a 50% disability rating. [R. at 1838]; *see* 38 C.F.R. § 4.124a, Diagnostic Code (DC) 8100. Notably, the RO assigned an effective date of May 13, 2015, for a 50% evaluation was "based on the Board's finding [in the May 13, 2015, remand] that your headaches have worsened in severity since your May 2007 examination." [R. at 1839]. In other words, the 50% disability evaluation was assigned based on when it was factually ascertainable that his headaches caused "very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability." *See* 38 C.F.R. § 4.124A, DC 8100. While it wasn't until the August 30, 2016, VA examination where Appellant reported prostrating attacks productive of severe economic inadaptability, [R. at 1780], VA's assignment of an effective date based on a finding of worsening symptoms in the May 13, 2015, Board remand is favorable to Appellant.

Moreover, insofar as Appellant did properly appeal the effective date of the award of a 50% disability rating, [R. at 1759-61], Appellant does not point to evidence indicating an earlier onset date of his "very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability," as required under DC 8100. Rather, in Appellant's recitation of facts (under his argument heading), he only lists two pieces of evidence from the relevant appeal period, after May 7, 2007, which (divining argument from Appellant's general statements in his brief) suggests that the Board failed to consider this favorable

evidence when evaluating his claim. App. Br. at 10. Appellant lists evidence from the May 2007 VA examination, [R. at 8763-68], and an October 2009 VA examination, [R. at 4455-59], that note he has recurrent headaches.

Neither piece of evidence indicates that a higher evaluation would be warranted and the Board was under no obligation to discuss this evidence. *See Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007) (Board must only discuss that evidence which is relevant to the issues on appeal); *Caluza v. Brown*, 7 Vet.App. 498, 510-11 (1995), *aff'd per curiam*, 78 F. 3d 604 (Fed. Cir. 1996). Similarly, to the extent Appellant's citation to a September 1999 medical record from Dr. Stern (cited by Appellant as a record from 1998) is relevant to the time-period at issue, *see* App. Br. at 10, this evidence shows "sometimes severe" sinusitis (not headaches) in 1998. [R. at 3366 (3366-67)]. Appellant offers no argument as to how any of this evidence could warrant a higher evaluation, insofar as none of the evidence is shown to rise to the level required for a 50% disability rating. *See* 38 C.F.R. § 4.124a, DC 8100; App. Br. at 9-11. Thus, Appellant has failed to meet his burden to show error, let alone prejudice. *See Sanders*, 556 U.S. at 409; *Hilkert*, 12 Vet.App. at 151; *cf. Lamb v. Peake*, 22 Vet.App. 227, 235 (2008) (holding that there is no prejudicial error when a remand for a decision on the merits would serve no useful purpose); *Soyini v. Derwinski*, 1 Vet.App. 540, 546 (1991) (concluding that where evidence is overwhelmingly against a claim, remand for reasons or bases deficiency would result in unnecessary additional burdens on the Board and VA with no benefit to the veteran).

Regardless, the Board did review the evidence since May 2007 and stated that "although [Appellant's] argument is not a model of clarity," the evidence "does not support assigning an earlier effective date than May 13, 2015." [R. at 7-8]. The Board did discuss the May 2007 examination, noting that Appellant at that time "refused to answer the VA examiner's questions" and that he was "banned from receiving medical treatment at certain VA outpatient treatment facilities and medical centers for several years due to abusive, threatening, and other unacceptable behavior towards his treating VA clinicians." [R. at 9]. The Board also analyzed other evidence after 2007, noting that in May 2013, September 2013, and February 2014, Appellant denied experiencing headaches. [R. at 10]. The Board stated that "there was no factually ascertainable increase in the disability attributed to… headaches prior to his most recent VA headaches DBQ in August 2016." [R. at 12]. The Board further noted that Appellant had "not identified or submitted any evidence demonstrating his entitlement to an earlier effective date [other] than May 13, 2015. [R. at 12-13].

Appellant's citations to evidence during the relevant appeal period do not demonstrate that the Board's findings were clearly erroneous, but instead plausibly support its finding that a higher evaluation prior to May 2015 was not warranted. *Anderson v. City of Bessemer City, N.C.,* 470 U.S. 564, 574 (1985). ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."). As such, the Court should affirm the Board's determination that a 50% disability rating was not warranted prior to May 2015.

See Gilbert v. Derwinski, 1 Vet.App. 49, 52 (1990) (holding that the findings of the Board must be affirmed so long as there is plausible support for them in the record).

V. CONCLUSION

WHEREFORE, in light of the foregoing, the Court should affirm the November 5, 2018, Board decision.

Respectfully submitted,

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