IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-2024

MARIO N. DACOSTA,

Appellant,

v.

ROBERT L. WILKIE,

Secretary of Veterans Affairs,

Appellee.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

TABLE OF CITATIONS TO THE RECORD BEFORE THE AGENCY

IN THE UNITED STATES COURT OF APPEALS
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MARIO N. DACOSTA,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 19-2024
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE

BOARD OF VETERANS' APPEALS

APPELLANT'S BRIEF

ISSUES PRESENTED

I. Whether the Board clearly erred when it determined that it did not have jurisdiction to adjudicate a higher disability rating for tension headaches.

II. Whether the Board provided an inadequate statement of reasons or bases as required under 38 U.S.C. § 7104(d)(1) to support its finding that Appellant did not wish to pursue an initial rating for tension headaches in excess of 30 percent.

JURISDICTION

Appellate jurisdiction is predicated on 38 U.S.C. §§ 7252(a) and 7266(a).

NATURE OF THE CASE

Appellant, Mario N. Dacosta, appeals from a decision of the Board of Veterans' Appeals (Board) of December 14, 2018, which denied entitlement to an initial rating in excess of 30 percent for tension headaches. The Court should reverse or otherwise vacate and remand the Board's decision for readjudication.

The Board also granted entitlement to service connection for allergic rhinitis. Additionally, the Board granted an initial rating of 30 percent for tension headaches. These favorable findings cannot be disturbed by the Court. *See Medrano v. Nicholson*, 21 Vet. App. 165, 170 (2007) (holding that the Court is not permitted to reverse Board's favorable findings of fact).

The Board remanded Appellant's service-connection claim for coronary artery disease, including as secondary to the service-connected hypertension. This remanded issue is therefore not before the Court at this time. *See Breeden v. Principi*, 17 Vet. App. 475, 475 (2004).

STATEMENT OF THE RELEVANT FACTS

Appellant had active service with the U.S. Air Force from January 1989 to January 2013, during which he earned, *inter alia*, the Meritorious Service medal with 1 oak leaf cluster, Air Force Commendation medal with 2 oak leaf clusters, and the National Defense Service Medal. *See* Record before the Agency (**R.**) at **1115**.

A May 2012 Health Record indicated that Appellant had headaches for the past two months. **R. 56 (56-59)**. The record showed that the onset of headaches varies but usually occurred around lunch time with a slow crescendo over 3-4 hours, and that Appellant has them about once a week. **R. 56 (56-59)**. Although the record noted that the frequency is not increasing, Appellant treats with 600mg motrin that helps after an hour. **R. 56 (56-59)**. Occasionally, he experienced nausea and his pain begins with his face then becomes pounding and squeezing around his head and ears. **R. 56 (56-59).**

A June 2012 Health Record indicated that Appellant has headaches weekly to every other week. **R. 61 (61-65)**. Appellant further indicated that headaches were more frequent recently. **R. 62 (61-65)**.

Additionally, in June 2012, a headaches log indicated that he began suffering from headaches in March, treats the headaches with Motrin 800mg, and experiences onset about once a week on average. **R. 518 (518-20)**.

In August 2012, Appellant submitted a pre-discharge compensation claim form (21-526c). **R. 2414-15**. Headaches were one of the disabilities in which Appellant sought service connection. **R. 2414 (2414-15)**.

A September 2012 Health Record indicated that Appellant experienced headaches two times a week and was less responsive to abortives. **R. 82 (82-86)**. This same record notes that the headaches condition initially improved, but now Appellant experienced increased frequency. **R. 85 (82-86)**.

In September 2012, a Headaches (including Migraine Headaches) DBQ noted that Appellant was diagnosed with headaches, experienced pain on both sides of the head, duration is less than one day, does not experience characteristic prostrating attacks of migraine headache pain, does not experience prostrating attacks of non-migraine headache pain, and does not impact his ability to work. **R. 1209-11**.

An October 2012 Report of Medical Assessment noted that Appellant was soon to retire and listed headaches as one of the conditions for which he sought VA disability. **R. 1040 (1040-41)**.

A December 2012 Health Record indicated that Appellant experiences onset of headaches still once weekly or less. **R. 102**.

In February 2013, a rating decision granted service connection for tension headaches with a 0 percent rating from February 1, 2013. **R. 1132, 1134 (1131-37)**.

In September 2013, Appellant submitted his Notice of Disagreement for non-compensable evaluation for tension headaches on VA Form 21-0958. **R. 390 (390-91)**. Here, in the percentage sought column, he filled in "30%." **R. 390 (390-91)**. Appellant added, that he "suffer[s] from headaches every two weeks, sometimes weekly. Please review medical records that were submitted on December 14, 2012 and the attached log of my recent headaches and make a favorable decision on my claim." **R. 391 (390-91)**. The

headache log indicated frequency, severity, and duration of headaches between June and September. While entries vary in severity and duration, headaches do occur on a weekly or twice weekly basis. **R. 389**. Furthermore, entries in the log are provided indicating that the headaches have interfered with Appellant's ability to work "Thu-1 Aug-- 2am woke up with headache/severe, caused nausea even after Naproxen- Took Fioricet - called in sick did not go to work[.]" **R. 389**.

In June 2013, Appellant submitted a statement requesting an update for the increase in service-connected headaches claim. **R. 409-10**.

In April 2016, Appellant was provided a Statement of the Case. **R. 144-88**. Here, entitlement in excess of 0 percent was denied due to the September 2012 VA headaches examination noting no prostrating attacks of migraine or non-migraine pain. **R. 187 (144-88)**.

A May 2016 private treatment record noted "when [Appellant] has a severe migraine, he is completely unable to perform or do any of his job duties. This occurs at least once a month when these severe migraines do occur." **R. 103 (103-06)**. The record stated that Appellant took naproxen for milder migraines and Maxalt for more severe migraines. **R. 103 (103-06)**. In the Plan section, the examiner noted that Appellant "had significant symptoms that occur at least once per month in which he essentially is unable to perform the majority of his work activities because of the severity of his migraines. He also has more frequent, less severe migraines that occur at least once to two times per week." **R. 105 (103-06)**.

In June 2016, Appellant submitted his VA Form 9. **R. 107-08**. In the headaches section, Appellant noted his medical history and reiterated that the headaches interfere with work, stating, "I get at least 1 severe headache per month to have caused me to miss numerous work days because I cannot perform my assigned work." **R. 108 (107-08)**. Significantly, Appellant also noted for the Board to "please reconsider an evaluation in excess of 0 percent for my tension headaches." **R. 108 (107-08)**.

In a November 2018 Informal Hearing Presentation, the representative noted that the previous VA headaches examination was in January 2013, nearly six years before, and noted that "[Appellant] needs to be re-examined." **R. 13-14**.

In December 2018, the Board granted an initial rating of 30 percent, but no higher, for tension headaches. **R. 4-12**. Regarding a higher disability percentage, the Board stated that Appellant's September 2013 Notice of Disagreement "conveyed that a 30 percent disability rating would satisfy the appeal as to this issue. Such a full grant of benefits sought, coupled with express indication that the rating percentage sought fully satisfies the appeal." **R. 8 (4-12)**. The Board also determined that Appellant's "waiver of the remaining aspects of the appeal for a higher initial rating for headaches in excess of the 30 percent granted was knowing and intelligent, and is supported by the evidence of record." **R. 8 (4-12)**. From this line of reasoning, the Board rendered discussion of entitlement to an even higher 50 percent rating "moot." **R. 9 (4-12)**.

SUMMARY OF THE ARGUMENT

Appellant asserts that the Board clearly erred when the Board found that it did not have jurisdiction to address a higher disability rating. In the alternative, the Board erred by providing an inadequate statement of reasons or bases that it did not have jurisdiction to address a higher rating. Furthermore, the Board erred by failing to provide an adequate statement of reasons or bases to support its finding that Appellant did not wish to pursue an initial rating for headaches in excess of 30 percent. The Court should reverse the Board's finding that it did not have jurisdiction to address a higher rating or otherwise vacate the Board's decision and remand this claim for adjudication of whether a rating in excess of 30% is warranted.

ARGUMENT

I. The Board clearly erred when it determined that it did not have jurisdiction to adjudicate a higher disability rating for tension headaches.

A finding is "clearly erroneous" when, although there is evidence to support it, the Court is left with the definite and firm conviction that a mistake has been committed. *Gilbert v. Shinseki*, 26 Vet. App. 48, 52 (2012); *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). Reversal is appropriate where, despite the existence of controverting evidence, a finding of material fact is clearly erroneous. *Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013).

The Board stated, in granting a 30 percent disability rating for tension headaches, "the appeal for a higher initial rating for tension headaches is fully granted in the Board's instant decision." **R. 8 (4-12)**. The Board also noted that Appellant limited his grant to the 30 percent disability level on his Notice of Disagreement. **R. 8 (4-12)**, **R. 390 (390-91)** (September 2013 Notice of Disagreement). Here, the Board provided that:

> Because a higher 30 percent initial rating for tension headaches is granted for the entire initial rating period on appeal from February 1, 2013, which the Veteran represented would fully satisfy the initial rating issue on appeal, the Veteran has limited this appeal in both extent and time by withdrawing the aspects of the appeal that encompassed a higher initial rating than 30 percent for the entire initial rating period, including any questions of extraschedular referral or rating. See 38 C.F.R. § 20.204 (providing that an appellant may withdraw an issue at any time before the Board issues a final decision). For these reasons, any question of higher disability rating for tension headaches is rendered moot with no remaining questions of law or fact to decide. **R. 8-9 (4-12)**.

Here, the Board clearly erred because Appellant's Notice of Disagreement does not provide any indication or notice that Appellant intended to withdraw an issue before the

Board issued a final decision. **R. 390-91**. Furthermore, Appellant's June 2016 VA Form 9 noted that, as opposed to a 30 percent disability rating, Appellant wished to be evaluated for tension headaches "an evaluation in excess of 0 percent." **R. 108 (107-108)**. Based on these documents, the Board clearly erred when it failed take up jurisdiction as Appellant intended to pursue a higher rating.

Based on this clear error, Appellant respectfully requests the Court to reverse the Board's finding that it did not jurisdiction to adjudicate a higher disability rating for tension headaches. In the alternative to this argument, the Board provided an inadequate statement of reasons or bases that it did not have jurisdiction to address a higher rating. In this case, Appellant requests the Court to remand back to the Board to provide adequate reasons or bases on this point of law.

II. The Board provided an inadequate statement of reasons or bases as required under 38 U.S.C. § 7104(d)(1) to support its finding that Appellant did not wish to pursue an initial rating for tension headaches in excess of 30 percent.

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). The statement must be adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review by the Court. *See Gilbert v. Derwinski*, 1 Vet. App. 49, 57 (1990). The lack of an adequate statement of reasons or bases frustrates judicial review. *See Deloach v. Shinseki*, 704 F.3d 1370, 1374 (Fed. Cir. 2013).

In its decision, the Board stated that Appellant's September 2013 NOD "conveyed that a 30 percent disability rating would satisfy the appeal as to this issue. Such a full grant

of benefits sought, coupled with express indication that the rating percentage sought fully satisfies the appeal." **R. 8 (4-12)**. The Board also determined that Appellant's "waiver of the remaining aspects of the appeal for a higher initial rating for headaches in excess of the 30 percent granted was knowing and intelligent, and is supported by the evidence of record." **R. 8 (4-12)**. From this line of reasoning, the Board rendered discussion of entitlement to a 50 percent rating "moot." **R. 9 (4-12)**.

A. Failure to Liberally and Sympathetically Interpret Appellant's Lay Statements

The Board erred when it failed to sympathetically and liberally construe Appellant's lay statements when it determined that he waived a desire to seek a higher than 30 percent disability rating. It is beyond question that the Secretary of Veterans Affairs has a duty to sympathetically read a pro se veteran's filings to determine whether any claim has been raised for benefits. *Ingram v. Nicholson*, 21 Vet. App. 232, 239 (2007). Once a claim is received, the VA must review the claim, supporting documents, and oral testimony in a liberal manner. *See e.g. Douglas v. Derwinski*, 2 Vet. App. 435, 439 (1992) (en banc).

Here, although Appellant's February 2013 NOD sought a 30% rating for headaches (**R. 390 (390-91)**), his June 2016 VA Form 9 more generally stated "After reviewing [attached evidence], please reconsider an evaluation in excess of 0 percent for my tension headaches." **R. 108 (107-08)**. Here, a liberal and sympathetic reading of Appellant's VA Form 9 indicates that he desired the maximum disability rating afforded by law in this regard. *See Ingram*, at 239; *Douglas*, at 439. At the very minimum, the Board decision did not address Appellant's VA Form 9 (the more general increase in excess of 0 percent for his headaches) in its weighing of the evidence from which it inferred that Appellant

was satisfied with a 30 percent disability rating. *See* **R. 7-9 (4-12)**; *see also Todd v. McDonald*, 27 Vet. App. 79, 86 (2014) (holding that the Board is required to specifically address material record evidence that is potentially favorable to the claim), *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995) (holding that the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant.).

As a result of the Board's non-discussion of Appellant's VA Form 9 requesting an increased rating more generally, rather than capping the disability at 30 percent as was inferred by the Board, the Board's statement of reasons or bases is inadequate, thereby frustrating judicial review. *See* **R. 108 (107-08)**, **R. 390 (390-91)**; *Deloach*, at 1374.

B. Application of AB v. Brown, 6 Vet. App. 35 (1993)

The Board erred by providing an inadequate statement of reasons or bases when it did not apply the favorable aspects of *AB v. Brown*, 6 Vet. App. 35 (1993). Where there is no clearly expressed intent to limit the appeal to entitlement to a specific disability rating for the service-connected condition, the RO and BVA are required to consider entitlement to all available ratings for that condition. *AB*, at 39. The VA historically has adjudicated claims and administered benefits in a paternalistic, non-adversarial setting. *Guerrieri v. Brown*, 4 Vet. App. 467, 472 (1993); *see also Littke v. Derwinski*, 1 Vet. App. 90, 91 (1990) (stating that "[t]he VA takes pride in operating a system of processing and adjudicating claims for benefits that is both informal and nonadversarial."). When confronted with evidence demonstrating the potential applicability of a statutory provision or regulation

that was not expressly raised by the claimant earlier, the Board must inform the claimant that he may be eligible under that provision. *See Douglas v. Derwinski*, 2 Vet. App. 103, 109 (1992); *aff'd in relevant part*, *Douglas v. Derwinski*, 2 Vet. App. 435 (1992) (en banc). Moreover, it is notable that non-lawyer representatives are not generally trained in law. *See Comer v. Peake*, 552 F.3d 1362, 1370 (Fed. Cir. 2009) (citing *Cook v. Brown*, 68 F.3d 447, 451 (Fed. Cir. 1995) ("Although aides from veterans' service organizations provide invaluable assistance to claimants seeking to find their way through the labyrinthine corridors of the veterans' adjudicatory system, they are 'not generally trained or licensed in the practice of law.'").

Appellant's claim is before the Court because he merely filled in "30%" on his Notice of Disagreement (**R. 390 (390-91))** from which the Board inferred Appellant's unequivocal desired rating for his headaches *and no more*. **R. 7-9 (4-12)**. The Board's finding that Appellant would be fully satisfied with 30 percent disability rating runs contrary to the full holding in *AB* for which the Board puzzlingly cites as support that Appellant was satisfied with a 30 percent disability rating. In *AB*, the Court recognized that a claimant may "limit a claim or appeal to the issue of entitlement to a particular disability rating which is less than the maximum disability rating allowed by law." *AB*, at 39. However, the requirement to do so as provided by the *AB* Court, is when a claimant expressly indicates an *intent*. *Id.* For example, the *AB* Court noted that "In [the claimant's] February 1988 NOD and his May 1988 1-9 Appeal, the veteran expressed general disagreement with the assignment of a 10% rating[.]" *Id*. at 39. The Court ultimately held that "where, as here, there is no clearly expressed intent to limit the appeal to entitlement to a specific disability rating for

the service-connected condition, the RO and BVA are required to consider entitlement to *all available ratings* for that condition." *Id*. at 39 (emphasis added).

Here, the Board construed Appellant's NOD that a 30 percent disability rating would satisfy Appellant's headaches disability rating. **R. 7-9 (4-12)**, **390 (390-91)**. Appellant's NOD, however, did not clearly express intent to limit the appeal to a headaches rating of 30 percent. **R. 390-91**. In this regard, Appellant noted a disability rating percentage that he sought, because the form requested that information, but he did not clearly express that he would have withdrawn the appeal on receiving the 30 percent disability rating. *See Bradley v. Peake*, 22 Vet. App. 280, 294 (2008) (holding that the Secretary is required to maximize benefits); *Ingram*, at 256-57 (holding that "it is the Secretary who knows the provisions of title 38 and can evaluate whether there is potential under the law to compensate an averred disability based on a sympathetic reading of the material in a pro se submission."). Ultimately, the Board's finding, Appellant's "express indication" that he would be satisfied with a 30 percent disability, is nowhere to be found on the NOD itself. **R. 8 (4-12)**, **390-91**.

Moreover, the Board failed to address Appellant's VA Form 9 which more generally sought an increase in excess of 0 percent. **R. 108 (107-08)**. The Board's failure to consider the VA Form 9 runs afoul of the holding in *AB*, where Appellant "expressed *general disagreement* with the assignment of [a rating] and requested a 'greater evaluation than granted'." *AB*, at 39 (emphasis added). Furthermore, the VA Form 9 request, "please reconsider an evaluation in excess of 0 percent for my tension headaches[,]" (**R. 108 (107-08)**) should be construed through a liberal and sympathetic reading such that the Board's

finding that Appellant's waiver was knowing, intelligent, and supported by evidence of record is inadequate. **R. 8 (4-12)**.

C. DeLisio Standards Unsubstantiated

In addition to the previous argument, the Board erred in providing an inadequate statement of reasons or bases when it *only inferred from* Appellant's lay statements that he was satisfied with a 30 percent disability rating, thus withdrawing pursuit of a higher disability rating. Withdrawal of a claim is only effective where the withdrawal is explicit, unambiguous, and done with a full understanding of the consequences of such action on the part of the claimant. *DeLisio v. Shinseki*, 25 Vet. App. 45, 57 (2011). *See also Acree v. O'Rourke*, 891 F.3d 1009, 1013 (Fed. Cir. 2018) (holding that by requiring that an effective withdrawal must be explicit, unambiguous, and undertaken with a full understanding of its consequences, the *DeLisio* standard provides a bulwark against the inadvertent or uninformed forfeiture of a veteran's rights). None of those elements can be found in Appellant's NOD much less anywhere else in the appeal.

The Board's finding, that "[Appellant's] waiver of the remaining aspects of the appeal for a higher initial rating for headaches in excess of the 30 percent granted was knowing and intelligent, and is supported by the evidence of record[,]" is purely conclusory. **R. 8 (4-12)**; *see also Gilbert*, at 57 (holding that a bare conclusory statement, without both supporting analysis and explanation, is neither helpful to the veteran, nor 'clear enough to permit effective judicial review', nor in compliance with statutory requirements.). As indicated, *supra*, the Board's finding does not address and reconcile the more general statement seeking an increased rating in Appellant's later-in-time Form

9, which shows that any purported attempt to limit his appeal was no longer desired. *See* **R. 108 (107-08)** ("please reconsider an evaluation in excess of 0 percent for my tension headaches."). Furthermore, in order to waive consideration of a legal provision, a claimant:

> must first possess a right, [] must have knowledge of that right, and [] must intend, voluntarily and freely, to relinquish or surrender that right. *See United States v. Olano*, 507 U.S. 725, 732-33, 113 S. Ct. 1770, 123 L. Ed.2d 508 (1993) (holding waiver is the "'intentional relinquishment or abandonment of a known right'" (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938))); *McCall v. U.S. Postal Service*, 839 F.2d 664, 668 (Fed. Cir. 1988) (upholding employee's waiver of appeal of disciplinary action, U.S. Court of Appeals for the Federal Circuit . . . acknowledged that Merit Systems Protection Board had deemed such "right to appeal . . . susceptible to waiver if the action was the informed, intentional abandonment of a known right, free of any coercion or duress") . . . ..

Janssen v. Principi, 15 Vet. App. 370, 374 (2001); *see also Acree v. O'Rourke*, 891 F.3d 1009, 1015 (Fed. Cir. 2018) (citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744, 105 S. Ct. 1598, 84 L. Ed. 2d 643 (1985) ("[I]f the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."); *Verdon v. Brown*, 8 Vet. App. 529, 533 (1996) ("[W]here it is not clear that a VA claimant has withdrawn a particular claim from an appeal to the [board], it is not sufficient for the [b]oard to conclude that there is an abandonment without providing an adequate statement of reasons or bases to support that conclusion.").

Here, the Board decision did not address Appellant's VA Form 9, **R. 4-12**; **108 (107-08)** ("please reconsider an evaluation in excess of 0 percent for my tension headaches"), which *at the very minimum,* presents to the Board that Appellant's desire to withdraw from

pursuit of a higher disability claim is ambiguous. **R. 108 (107-08)**. Furthermore, according to the *DeLisio* standard, effective withdrawal must be explicit, unambiguous, and undertaken with a full understanding of its consequences. *DeLisio*, at 57. *See also Acree*, at 1013. The Board did not discuss the contents of Appellant's VA Form 9 to infer his desire to waive pursuit of a 50 percent rating, and whether it should amount to an intention to waive pursuit of a higher rating. **R. 8 (4-12)**. The presence of Appellant's VA Form 9, should at the very minimum, muddy the waters of the Board's finding that Appellant's waiver "was knowing and intelligent, and is supported by the evidence of record." **R. 8 (4-12)**. Consequently, the Board's omitting discussion of the VA Form 9 is prejudicial. *See Verdon*, at 533. Even more so, on Appellant's NOD, nowhere does it express any clear intent to maximize the headaches rating at 30 percent. **R. 390-91**. On this point, in line with the holding in *DeLisio,* Appellant did not show any understanding whatsoever of the consequences of the withdrawal (that he would lose his appeal and any chance at higher rating over those appeal dates). 25 Vet. App. at 57.

The Board also nonsensically relied upon 38 C.F.R. § 20.204 (2018) as "providing that an appellant may withdraw an issue at any time before the Board issues a final decision". **R. 9 (4-12).** That regulation also, however, required "a statement that the appeal is withdrawn." § 20.204(b)(1). Such a statement is conspicuously absent from the record.

Ultimately, if the Board's position were accepted, that indicating a desired percentage on the NOD without more and without notifying Appellant that he is limiting his appeal by doing so, the Board sets a trap for Appellant and other veterans. *See Comer*, at 1369 (holding that "[t]he VA disability compensation system is not meant to be a trap

for the unwary, or a stratagem to deny compensation to a veteran who has a valid claim, but who may be unaware of the various forms of compensation available to him.").

> When standard forms were proposed in 2013, the agency stated:
>
> > We wish to clarify that it is not VA's intention to be overly technical in determining whether claimants have completed a form. The purpose of this rule is the orderly and efficient processing of veterans' claims and appeals, not the exclusion of legitimate appeals, and VA's decision to deem a form incomplete and request completion will be guided by this principle. *See Robinson v. Shinseki*, 557 F.3d 1355, 1361 (Fed. Cir. 2009) ("[i]n direct appeals, all filings must be read in a liberal manner whether or not the veteran is represented").

78 Fed. Reg. 65,490, 65,500 (Oct. 31, 2013). Upon promulgation of standardized forms in 2014, the agency noted:

> One commenter asked if a veteran indicates a particular effective date on a standard form, but the correct date is earlier, which date VA would grant. In the clean hypothetical situation posited by the commenter, the answer is that VA would grant the correct date. Again, the requirement to use a standard form to initiate the appeal, even a form that solicits particular information in order to facilitate accurate and efficient consideration of the claim, does not alter the scope of VA's "development and review" action required by 38 U.S.C. 7105(d).

79 Fed. Reg. 57,660, 57,685 (Sep. 25, 2014). Appellant asserts that this position is entirely correct, such that if an appellant specifies a lower evaluation than he is entitled to in response to a form "that solicits particular information in order to facilitate accurate and efficient consideration of the claim", *id.*, VA should grant the correct evaluation rather than eschew its statutory obligation to fully develop and review appeals. This would be wholly inconsistent with the non-adversarial claims system. *See Douglas v. Derwinski*, 2 Vet. App. 435, 439 (1992) (noting the "basic principle of the VA claims process that claims will

be processed and adjudicated in an informal, nonadversarial atmosphere."). Accordingly, on this point, judicial review is frustrated. *See Deloach*, at 1374.

D. Prejudicial Error

The Board erred by providing an inadequate statement of reasons or bases, resulting in prejudicial error, when it did not evaluate favorable evidence supportive of a higher rating. The Secretary is required to maximize benefits. *Bradley v. Peake*, 22 Vet. App. 280, 294 (2008). The Board is required to explain, in the context of the facts presented, the rating criteria used in determining the category into which the veteran's symptoms fall. *Shoemaker v. Derwinski*, 3 Vet. App. 248, 253 (1992). It is the obligation of the Board to ensure that its findings are explained and that the record adequately supports its findings. *Shoemaker*, at 254. An error below, whether procedural or substantive, is prejudicial when the error affects a substantial right so as to injure an interest that the statutory or regulatory provision involved was designed to protect such that the error affects the essential fairness of the adjudication. *Mayfield v. Nicholson*, 19 Vet. App. 103, 116 (2005). *See also Arneson v. Shinseki*, 24 Vet. App. 379, 388–89 (2011) (finding of prejudice is warranted where an error "could have made [a] difference in [the] outcome" of the claim).

Appellant submitted a headache log that indicated frequency, severity, and duration of headaches between June and September, 2013. Entries on severity and duration of headaches vary, but indicate onset a weekly or twice weekly basis. **R. 389**. Furthermore, the headaches log provides evidence that headaches interfered with Appellant's ability to work. **R. 389**. For example, one entry stated, "Thu-1 Aug-- 2am woke up with

headache/severe, caused nausea even after Naproxen- Took Fioricet - called in sick did not go to work[.]" **R. 389**.

Moreover, a May 2016 private treatment record noted "when [Appellant] has a severe migraine, he is completely unable to perform or do any of his job duties. This occurs at least once a month when these severe migraines do occur." **R. 103 (103-06)**. The record stated that Appellant took naproxen for milder migraines and Maxalt for more severe migraines. **R. 103 (103-06)**. In the Plan section, the examiner noted that Appellant "had significant symptoms that occur at least once per month in which he essentially is unable to perform the majority of his work activities because of the severity of his migraines. He also has more frequent, less severe migraines that occur at least once to two times per week." **R. 105 (103-06)**.

The prejudice here results from the Board's non-discussion of favorable evidence supportive of a higher rating. Whereas Diagnostic Code 8100 at the 30 percent rating requires characteristic prostrating attacks occurring on an average once a month over last several months, at 50 percent, DC 8100 requires very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability. *See* 38 C.F.R. § 4.124a. The Board's statement that "[Appellant] also reported that during episodes of severe headaches that occur at least once a month he is completely unable to perform any of his job duties." (emphasis in original) does not satisfy the requirements of *Shoemaker* that "[the Board's] findings are explained and that the record adequately supports its findings." 3 Vet. App. at 254. Importantly, Appellant's 2013 headaches log and the 2016 private treatment records provide evidence supportive of headaches "with very frequent

completely prostrating and prolonged attacks productive of severe economic inadaptability" at 50 percent as opposed to "characteristic prostrating attacks" at 30 percent. *See* 38 C.F.R. § 4.124a, DC 8100; **R. 103, 105 (103-06)**, (May 2016 private treatment record), **389** (September 2013 headache log). Finally, DC 8100 makes no mention of medication, and if the applicable DC "does not specifically contemplate the effects of medication, the Board is required pursuant to *Jones* to discount the ameliorative effects of medication when evaluating" the disability in question. *McCarroll v. McDonald*, 28 Vet. App. 267, 271 (2016) (en banc) (citing *Jones v. Shinseki*, 26 Vet. App. 56, 63 (2012)). Discounting the effects of Naproxen, Maxalt, and Fioricet would also have weighed in favor of granting a higher rating, had the Board not refused to fully adjudicate this appeal based on the pro se appellant typing "30%" in a box on Form 21-0958. **R. 390 (390-91)**.

As a result of not discussing this favorable evidence, Appellant is unfairly prejudiced from being granted a rating in excess of 30 percent, which, as discussed above, is supported by medical and lay evidence.

CONCLUSION

In light of the Board's errors, Appellant respectfully requests that the December 14, 2018, decision on appeal be reversed or otherwise vacated and remanded, to the extent it was unfavorable, and that this matter be readjudicated for the reasons and under the authorities discussed above.

Respectfully submitted,

/s/ Glenn R. Bergmann
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November 7, 2019

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