Vet.App. No. 19-2024

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

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**MARIO N. DACOSTA,**
Appellant,

**v.**

**ROBERT L. WILKIE,**
Secretary of Veterans Affairs,
Appellee.

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**ON APPEAL FROM THE BOARD OF VETERANS' APPEALS**

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# BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

***Cases***

***United States Code***



***Code of Federal Regulations***

## RECORD BEFORE THE AGENCY CITATIONS

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

| | | |
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| **MARIO N. DACOSTA,** | ) | |
| Appellant, | ) | |
| | ) | |
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**ON APPEAL FROM**
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# BRIEF OF APPELLEE
# SECRETARY OF VETERANS AFFAIRS

## I. ISSUE PRESENTED

Whether the Court should affirm that portion of the December 14, 2018, Board of Veterans' Appeals (Board) decision that found that Appellant had limited the scope of his appeal to entitlement to an initial rating of 30% for tension headaches and fully granted as much.

## II. STATEMENT OF THE CASE

### A. Jurisdiction

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

### B. Nature of the Case

Mario N. Dacosta (Appellant) appeals the December 14, 2018, Board decision to the extent that it found that he had limited his claim for an increased rating for tension headaches to 30%. (*See* Record ((R.) at 7-9 (Board decision at

4-6)).[1] Appellant variously contends that the Board was clearly erroneous in its determination or supplied an inadequate statement of reasons or bases in support of its conclusion. (Appellant's Brief (App. Br.) at 8-20). The Secretary disputes these contentions.

**C. Statement of Relevant Facts**

A February 2013 rating decision awarded Appellant service connection for tension headaches and assigned a noncompensable rating. (R. at 1131-37). In September 2013 Appellant submitted a standardized notice of disagreement (NOD) form, wherein he noted his specific issue of disagreement as "Service Connection for Tension Headaches non[-]compensable evaluation," his area of disagreement as "evaluation of disability" and the percentage evaluation sought as "30%." (R. at 390 (390-91)). In the comment section, he noted having "headaches every two weeks, sometimes weekly" and requested "a favorable decision on my claim." (R. at 391). The Regional Office (RO) issued a Statement of the Case (SOC) in April 2016 (R. at 146-88), and Appellant filed his substantive appeal to the Board in June 2016. (R. at 107-08). In the December 2018 decision now before the Court, the Board found that, by virtue of the explicit indication on his NOD form, Appellant had limited the percentage he was seeking on appeal for his

[1] The Board's grant of service connection for allergic rhinitis is a favorable finding, which the Court may not overturn. *Medrano v. Nicholson*, 21 Vet.App. 165, 170-71 (2007). Additionally, the Board's remand of the issue of service connection for coronary artery disease is not before the Court. *Kirkpatrick v. Nicholson*, 417 F.3d 1361 (Fed. Cir. 2005) (holding that a Board remand is not a final decision within the meaning of 38 U.S.C. § 7252(a)).

tension headaches to 30%. (R. at 7-8, 4-12). The Board assigned a 30% evaluation and found that to be a full grant of the benefits sought on appeal. (*Id.*). This appeal followed.

## III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's decision. The law permits a claimant to limit the scope of his appealed claim for benefits to a certain percentage and that is what happened here. The Board had a fully plausible basis for finding that Appellant had limited the scope of his appeal, based on the specific representation in Appellant's NOD that 30% was the percentage sought. Nothing cited by Appellant contradicts this representation. Given the Board's plausible finding that Appellant had limited the benefits sought to a 30% rating, the Board's grant of a 30% was a full grant of the benefits sought. The Board explained its reasoning in a straightforward and clear manner, and its statement of reasons or bases is fully sufficient to permit judicial review. Appellant fails to show that the Board's findings of fact are clearly erroneous, that the Board misapplied the law, or that any purported inadequacy in the Board's reasons or bases is preclusive of judicial review. Thus, Appellant has failed to meet his burden of demonstrating error in the Board's decision.

## IV. ARGUMENT

### A. The Board Had a Fully Plausible Basis for Finding That Appellant Had Limited the Scope of His Appeal

The most significant question before the Court is whether the Board clearly erred in finding that Appellant limited his claim for an increased rating for tension headaches to 30%. The law provides an appellant broad authority to define the scope of his appeal and consequently his withdrawal or limitation of said appeal. *See Hanson v. Brown*, 9 Vet.App. 29, 32 (1996) ("Veterans are as free to withdraw claims as they are to file them."); *AB v. Brown*, 6 Vet.App. 35, 39 (1993) (holding that a claimant may limit a claim or appeal to entitlement that is less than maximum allowed by law); *Evans v. Shinseki*, 25 Vet.App. 7, 15 (2011) (holding that issues on appeal can be limited where an appellant's intent to do so is clear). An appellant, or his representative, may withdraw an appeal of one or more issues in a claim by submitting, in writing, a statement identifying the veteran, the applicable VA file number, "and a statement that the appeal is withdrawn." 38 C.F.R. § 20.204(a)-(b)(2018). A Board determination that a claimant has limited or withdrawn their appeal is a finding of fact subject to the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4). *Warren v. McDonald*, 28 Vet.App. 214, 217 (2016). Under the "clearly erroneous" standard of review, the Court is not permitted to substitute its judgment for that of the Board on issues of material fact; if there is a "plausible" basis in the record for the Board's factual determinations, the Court cannot overturn them. *Gilbert v. Derwinski*, 1 Vet.App.

49, 53 (1990). To the extent Appellant suggests that reversal is warranted, reversal is the appropriate remedy only in narrow circumstances where there is absolutely no plausible basis for, and when the only permissible view of the evidence is contrary to, the Board's decision. *See Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004).

Here, the Board plausibly found that Appellant had limited his appeal of the initial rating for tension headaches to 30%. (R. at 8) ("In the September 2013 Notice of Disagreement, the Veteran conveyed that a 30[%] disability rating would satisfy the appeal as to this issue."). There is nothing clearly erroneous or reversible in this finding of fact. On his NOD, Appellant clearly indicated that the percentage evaluation he was seeking was 30%. (R. at 390-91). The Board found as much in its decision. (R. at 8 ("In the September 2013 Notice of Disagreement, the Veteran conveyed that a 30 percent disability rating would satisfy the appeal as to this issue")). The Board thus had a plausible basis for its conclusion in this regard.

Appellant's argument here is merely an assertion that the "Notice of Disagreement does not provide any indication or notice that Appellant intended to withdraw an issue before the Board." (App. Br. at 8). Although it is unclear from Appellant's brief, he appears to take issue with the Board's characterization of the limitation stated in his NOD as a "withdrawal" and provides, without explanation, a conclusion that this somehow amounts to not only clear but reversible error.

The Board is not required "to use particular statutory language, or 'terms of art'" to produce a valid decision. *Jennings v. Mansfield*, 509 F.3d 1362, 1366 (Fed. Cir. 2007). Whether the Board chose to characterize this as a limitation of the appeal to 30%, or a withdrawal of the appeal in excess of 30%, is immaterial; they are two ways of saying the same thing and are expressly allowed under the law. Indeed, the Court has not specifically distinguished between the limitation of an appeal in terms of degree of disability or the number/nature of issues. *See e.g. Evans*, 25 Vet.App. at 15 ("Further, the Secretary has specifically provided procedures for a withdrawal of an entire appeal or issues within an appeal, which procedures specifically require that the withdrawal be in writing. Thus, the issues on appeal could have been limited if the record was clear that the appellant wished to do so. 38 C.F.R. § 20.204."). The Board explained that "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[%] for the entire initial rating period." (R. at 8-9). Regardless of whether the situation at hand constitutes a limitation equating to a partial withdrawal or vice-versa, in either case the Board had a plausible basis for its finding that Appellant limited his appeal to 30% (or semantically that he had withdrawn the appeal for a rating in excess of 30%). Appellant admits as much in his brief. (App. Br. at 10 ("Here although Appellant's February 2013 NOD sought a 30% rating for headaches (**R. [at] 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**)." ("[attached evidence]" alteration in original)). Thus, although Appellant twists this latter statement to be a plea for a rating, it is clear that 30% is "in excess of 0 percent." It is unclear how the Board's choice of phrasing amounts to reversible error and no meaningful explanation can be discerned from Appellant's brief. *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (holding that the appellant bears the burden of demonstrating prejudicial error); *Hilkert v. West*, 12 Vet.App. 145, 151 (1991). Though Appellant appears to also argue that the identification of the benefits sought is not a limitation or withdrawal, he has proffered no other plausible explanation for what this would mean instead. Indeed, his is in fact a *post hoc* rationalization itself. In any case, the Board's interpretation of Appellant's NOD as intending to limit his claim to the identified percentage sought is most certainly based on a plausible reading of Appellant's language. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *United States v. Yellow Cab Co*., 338 U.S. 338, 342 (1949). In applying the "clearly erroneous" standard, the Court may not overturn the Board's factual finding if supported by a plausible basis, even if the Court may not have reached the same factual determination. *Forcier v. Nicholson*, 19 Vet.App. 414, 421 (2006).

## B. The Board's Statement of Reasons or Bases Was Fully Sufficient To Enable Judicial Review

### 1. The Board's Finding That Appellant Limited His Appeal Was Clearly Explained

The Board's statement of reasons or bases must be adequate to serve two purposes: to enable the claimant to understand the precise basis for its decision; and to facilitate judicial review. *Allday v. Brown*, 7 Vet.App. 517, 527 (1995). The remainder of Appellant's arguments are couched in terms of inadequate reasons or bases, but they simply do not demonstrate that the Board's analysis or findings are incomprehensible or preclusive of judicial review. Appellant has therefore not met his burden of demonstrating error. *See Johnson v. Shinseki*, 26 Vet.App. 237, 247 (2013) ("A Board statement should generally be read as a whole, and if that statement permits an understanding and facilitates judicial review of the material issues of fact and law presented on the record, then it is adequate." (citation omitted)). While Appellant attempts to "muddy the waters" and urges the Court to find ambiguity where none exists, the Board's finding was based upon Appellant's unambiguous written statement. The Board's finding in this regard was clear and fully explained. The Board found that, "in the September 2013 Notice of Disagreement, the Veteran conveyed that a 30[%] disability rating would satisfy the appeal as to this issue." (R. at 8). Indeed, it found quite clearly that, as opposed to a situation where a claimant had not given an expression that a certain percentage amount would satisfy the appeal, Appellant had given an "express indication" that the amount granted would fully satisfy the appeal." (*Id.*). As noted,

Appellant clearly stated that 30% was the percentage evaluation he was seeking. (R. at 390). On that basis, the Board found that the 30% rating it granted is what "the Veteran represented would fully satisfy the initial rating issue on appeal," and that such a grant was therefore a full grant of benefits. (*Id.*). There is no question remaining as to why the Board found the way it did, and there should be no difficulty with judicial review of the matter.

2. A Liberal and Sympathetic Reading of Appellant's NOD Indicates That He Was Seeking a 30% Evaluation for His Tension Headaches

The Board is required to review pro se pleadings liberally and sympathetically. *Robinson v. Shinseki*, 557 F.3d 1355, 1359-60 (Fed. Cir. 2009). However, the Board may reasonably conclude, as it did here, that there is no ambiguity to be resolved with a sympathetic reading or a liberal construction of the pleadings. *Robinson v. Mansfield*, 21 Vet.App. 545, 554-55 (2008), *affirmed sub nom.* 557 F.3d 1355. While a sympathetic reading may be necessary to resolve ambiguity, it does not allow the Board to make a finding completely antithetical to a claimant's stated intent, especially where, as here, there is no ambiguity in the statement at issue. The Board was bound by Appellant's stated intent. *Hamilton v. Brown,* 4 Vet.App. 528, 544 (1993) (holding that, "where . . . the claimant expressly indicates an intent that adjudication of certain specific claims not proceed at a certain point in time, neither the RO nor BVA has authority to adjudicate those specific claims, absent a subsequent request or authorization from the claimant or his or her representative").

Appellant's intent to limit the scope of his appeal is clear on its face. Indeed, the only plausible view of Appellant's NOD is that he was seeking 30%. He could have written 50% or 70% or 100% or left the form completely blank, but he did not. The Board was perfectly within its ambit to find that this was an indication of intent to limit the appeal. Indeed, there is no other plausible explanation for his writing "30%" in response to the "percentage sought (if known)" and Appellant has not proffered any other explanation for what he wrote. It is therefore unclear how any amount of liberal construction by the Board would provide a different explanation. Indeed, if the Board were to find that Appellant had not limited his appeal to the 30% rating, it would render Appellant's statement completely meaningless.

3. Appellant's Substantive Appeal Is Not Incongruous with His NOD.

Appellant attempts to insert ambiguity where there is none, arguing that the Board failed to address his VA Form 9. (App. Br. at 10-11, 13, 15-16). However, there is nothing in Appellant's form 9 that conflicts with or contradicts his NOD. Appellant notes that the VA Form 9 states, "After reviewing [attached evidence], please reconsider an evaluation in excess of 0 percent for my tension headaches" (R. at 108 (alteration in original)), and he now argues that "a liberal and sympathetic reading of Appellant's VA Form 9 indicates that he desired the maximum disability rating afforded by law." (App. Br. at 10). However, there is nothing to substantiate this argument because nothing in Appellant's form 9 contradicts his NOD. In Appellant's NOD he listed his specific issue of disagreement as "service connection for tension headaches with non[-

]compensable evaluation" and marked his area of disagreement as "evaluation of disability" before stating that 30% was the percentage evaluation he was seeking. (R. at 390). The statement in Appellant's VA form 9, "please reconsider an evaluation of 0% for my tension headaches" is in no way at odds with what he stated in his NOD. Moreover, Appellant offers no explanation for how such a statement indicates he was seeking the maximum possible amount other than it was "more general." (App. Br. at 9). However, Appellant indicated in both forms that he was challenging the non-compensable evaluation. All that Appellant's Form 9 demonstrates is that he remained unsatisfied with his non-compensable, 0% rating. There is nothing from the record indicating that divergent positions were taken in the NOD and Form 9. Regardless of whatever interpretation Appellant feels the Board should have had, there is certainly nothing in the Form 9 that would specifically refute his previously stated intent to be seeking 30%.

This is not to say that an appellant's intent cannot ever be gleaned from other documents beyond the NOD. However, once a claimant has stated his intent to limit his appeal, something even remotely specific would be required to contradict that statement to allow the Board to find that it was made in error. For instance, if Appellant had specifically contradicted himself or elsewhere applied for TDIU due to headaches or stated that he was completely disabled by his headaches, such might be enough for the Board to plausibly find that Appellant did not mean to limit his appeal to 30%. But such is not the case here, and there is nothing cited by Appellant that even implicitly, let alone explicitly conveys that he

was seeking the maximum amount in contravention to what was stated on his NOD.

4. The Board Correctly Applied *AB v. Brown*

A claimant is generally presumed to be seeking the maximum evaluation available under law. *AB v. Brown*, 6 Vet.App. 35, 39 (1993). However, as noted, a claimant can choose to limit the appeal to a claim for less than the maximum rating, where, as here, Appellant's indication and intent were clear and unambiguous. *Id.* at 35. As intimated by the Board, the facts in *AB* are distinguishable from the facts of this case. (R. at 8). In *AB*, the Court found that "the fact that the veteran's representative expressly discussed the criteria for only a 30% rating does not operate to limit the appeal to that specific question" and that "neither the veteran nor his representative ever stated that the veteran sought no more than a 30% rating. 6 Vet.App. at 39.

In this situation, Appellant specifically indicated the percentage sought on his NOD, distinguishing this case from *AB*, where the claimant never stated a percentage sought. Moreover, as Appellant notes and as the Board cited, 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," as Appellant did here, by stating as much. 6 Vet.App. at 39. If Appellant had not indicated 30% and had left the box blank, then *AB* would certainly apply, and the Board would have been obligated to find that Appellant

was seeking the maximum available benefit. However, such was not the case. The Board's citation to and application of *AB v. Brown* is correct.

5. *DeLisio* and *Acree* Are Inapplicable to the Facts of This Case

Appellant also cites to *DeLisio v. Shinseki*, 25 Vet.App. 45 (2011), and *Acree v. O'Rourke*, 891 F.3d 1009 (Fed. Cir. 2018), in support of his argument. However, both *DeLisio* and *Acree* dealt with *verbal withdrawals* of claims that occurred at Board hearings as opposed to the *written* limitation in this case. Both *DeLisio* and *Acree* discussed the application of that portion of 38 C.F.R. § 20.204(b)(1) that allows for appeals to be withdrawn verbally at Board hearings. As the Federal Circuit noted in *Acree*, "Section 20.204(b)(1) sets out with particularity the requirements for making a written request to withdraw a claim" and that the *DeLisio* Court had "determined that a statement made by a veteran *at a board hearing* qualifies as an effective withdrawal" only where is explicit, unambiguous; and done with a full understanding. 891 F.3d at 1012 (emphasis added). Thus, not only are the facts of *Acree* and *Delisio* completely distinguishable from the case at issue, the holdings are inapplicable, as noted by the Federal Circuit. 891 F.3d at 1014 ("We believe *DeLisio* sets a reasonable standard for withdrawals *at hearings* as contemplated by 38 C.F.R. § 3.103(c)(2) and 38 C.F.R. § 20.204(b)(1), and adopt it as well." (emphasis added)).

Appellant also accuses VA of attempting to "set[] a trap for Appellant and other veterans." (App. Br. at 16). However, such accusation is not only baseless, it misconstrues a claimant's role in the appellate process. The scope of an appeal

is initially defined by an appellant in his NOD. The Federal Circuit has affirmed an appellant's authority to make such a definition. A "broad NOD" "may confer jurisdiction over the entire request for benefits entitlement." *Maggitt v. West*, 202 F.3d 1370, 1375 (Fed. Cir. 2000). "Correspondingly, a narrow or specific NOD may limit the jurisdiction of the reviewing court to the specific elements of the disability request contested in the NOD." *Id.* The standard NOD form allows claimants to specify the issue, the nature of their disagreement with the issue, and the specific rating sought, if known, as to any or all the issues decided by an RO. However, a claimant's election to identify the percentage sought is completely permissive and is not mandatory. The NOD form states as much. (R. at 390 ("If you disagree on the evaluation of a disability, specify percentage evaluation sought, *if known*." (emphasis added, capitalization removed))). There is no requirement that any percentage be identified at all. 79 FR 57660, 57685 ("It would not be necessary for a claimant to describe the area of disagreement or percentage of the evaluation sought for each issue in order for VA to consider the form complete"). Thus, a claimant is free to shape his or her appeal in any way he or she sees fit, subject to the requirement that they identify at least the issues they are appealing. Moreover, a claimant may clarify, modify, or completely withdraw their NOD prior to the Board's issuance of a decision. *Isenbart v. Brown*, 7 Vet.App. 537, 541 (1995); *Evans v. West*, 12 Vet.App. 396, 401 (1999); 38 C.F.R. § 20.201-204 (2018). However, the necessary implication, if the NOD form is to have any meaning at all beyond specific issue identification, is that if a percentage

sought is specifically identified by a claimant, then that is presumptively the percentage on appeal, allowing VA to focus its development and resources accordingly. 79 FR 57660, 57684 ("This information enables VA to more efficiently process appeals and avoid expending time and other resources on matters the claimant does not contest"). The NOD is a jurisdiction-conferring document, and, if no explicit statements are received indicating otherwise, the Appellant is entitled to rely on the representations made by a claimant in their NOD as to the nature and scope of their appeal, and to find its jurisdiction accordingly. 38 U.S.C. § 7105(c).

Lastly, Appellant states the Board committed prejudicial error, but the remainder of the argument is largely a recitation of evidence that he believes would be relevant to the issue of a higher rating. The Board's consideration of Appellant's appeal, however is limited in scope to the matters being appealed, and its adjudicative jurisdiction does not extend beyond that. Thus, if the Board plausibly found that Appellant's appeal was limited to a 30% rating, then a grant of 30% is a full grant of the benefits sought, and neither the Board nor the Court have the authority, let alone obligation, to decide issues beyond that, such as the merits of a claim for a higher rating. 38 U.S.C. §§ 7252, 7266; *Hibbard v. West*, 13 Vet.App. 546, 548 (2000) (per curiam order) (noting that the Court's jurisdiction is statutorily limited to appeals of BVA decisions adverse to a claimant.)

If the Court finds that the Board had no plausible basis for finding that Appellant limited his claim to 30%, then it should reverse the Board's finding in that

regard and allow the Board to make the requisite findings of fact for a higher disability rating. However, if the Court finds that the Board's finding that Appellant had limited his claim to a 30% rating was plausible and not preclusive of judicial review, which the Secretary contends is the inescapable outcome, then this is a full grant of the benefits sought and Court should dismiss the appeal. *See Mokal v. Derwinski*, 1 Vet.App. 12, 15 (1990); *Medrano v. Nicholson*, 21 Vet.App. 165, 170-71 (2007); *see also Mayfield v. Nicholson,* 19 Vet.App. 103, 129 (2005) (holding that, where judicial review is not hindered by deficiency of reasons or bases, a remand for reasons-or-bases error would be of no benefit to the appellant and would therefore serve no useful purpose).

### C. Appellant Has Abandoned All Issues Not Argued in His Brief

Any and all issues or arguments that have not been raised in Appellant's opening brief have been abandoned. *See Disabled Am. Veterans v. Gober*, 234 F.3d 682, 688 n. 3 (Fed. Cir. 2000) (stating that the Court would "only address those challenges that were briefed"); *Pieczenik v. Dyax Corp*., 265 F.3d 1329, 1332-33 (Fed. Cir. 2001) ("It is well settled that an appellant is not permitted to make new arguments that it did not make in its opening brief").

## V. CONCLUSION

For the foregoing reasons, the Court should affirm the Board's December 14, 2018, decision to the extent discussed herein.

Respectfully submitted,

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