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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-0127

STEPHEN M. BROWN, APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before MOORMAN, *Senior Judge*.¹

MEMORANDUM DECISION

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

MOORMAN, *Senior Judge*: The appellant, Stephen M. Brown, appeals a November 5, 2018, Board of Veterans' Appeals (Board) decision that denied his claims for entitlement to an effective date earlier than May 13, 2015, for a 50% disability rating for his service-connected headaches; an effective date earlier than July 22, 2005, for a grant of special monthly compensation (SMC) at the housebound rate; and an effective date earlier than April 17, 2000, for a grant of a total disability rating based on individual unemployability (TDIU). Record (R.) at 3-21. This appeal is timely, and the Court has jurisdiction to review the Board's decision pursuant to 38 U.S.C. § 7252(a). Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will affirm in part and vacate in part the Board's decision and remand the vacated matter for readjudication.

I. BACKGROUND

Mr. Brown served in the U.S. Air Force from June 1971 to December 1974, May 1979 to February 1992, and March 1992 to September 1993. R. at 2607-09. In September 1979, Mr.

¹ Judge Moorman is a Senior Judge acting in recall status. *In re: Recall of Retired Judge*, U.S. VET. APP. MISC. ORDER 02-20 (Jan. 2, 2020).

Brown fell off a motorcycle while trail riding. R. at 2358. He was assessed with a strained neck and returned to regular duty. *Id.* During his July 1993 retirement examination, Mr. Brown denied a history of or current "frequent or severe headaches." R. at 2370-71. He reported "long term spinal problems and accompanying pain" and the examiner noted that Mr. Brown reported that his neck pain began in 1979 and had recurred since that time. *Id.*

During a March 1999 VA compensation and pension examination for sinusitis, Mr. Brown reported that his sinusitis began in 1971 in service and that he experienced intermittent sinus flareups since then, but that "he recently [had] been having more headaches and increased nasal purulent nasal discharge and sinus discomfort." R. at 10,946-47. He was diagnosed with "chronic sinusitis by history." *Id.* A September 1999 VA treatment record noted that Mr. Brown had "[c]hronic sinusitis, clear discharge, some headaches, sometimes severe." R. at 3366. The examiner also noted Mr. Brown's history of neck pain and C5-6 narrowing. *Id.*

In October 2000, Mr. Brown sought service connection for a head injury that occurred in service in 1979 and "all secondary and/or tertiary conditions thereto." R. at 10,242. In an October 27, 2000, memorandum a VA rehabilitation counselor opined that Mr. Brown was unemployable and that "there is enough evidence to conclude that Mr. Brown may have a legitimate claim for residuals of a head injury." R. at 1053-54. The VA counsellor also noted that he supported "Mr. Brown's new contention that his problems stem from the 1979 head injury." R. at 1054.

A December 2000 pain questionnaire reflects that Mr. Brown reported neck pain that began in 1979 from a motorcycle accident. R. at 1728. He stated that his pain had gradually worsened over time and spreads to his arms and back muscles and causes headaches. *Id.*

In January 2001, Mr. Brown saw a private physician with a complaint of "[p]ain in the neck since 1979." R. at 10,303-05. He stated that he hit his head and neck in a motorcycle accident in 1979 and that he has had pain in his neck ever since. *Id.* He denied "any headaches, dizziness or seizures." R. at 10,305.

Mr. Brown underwent a VA compensation and pension examination for mental disorders in May 2007. R. at 8763-68. He reported that he "had a motorcycle accident in 1979 [and] suffered a closed head injury, neck and head problems from that." R. at 8764-65. The examiner diagnosed, among other things, "[c]hronic headache and neck pain." R. at 8768.

In October 2007, the regional office (RO) issued a decision that, among other things, awarded service connection for headaches with a noncompensable rating, effective May 7, 2007.

R. at 7946-57. The RO found that Mr. Brown's headaches were "secondary to [his] service[-]connected neck condition based on the results of [the May 2007] VA [e]xamination," during which the examiner noted that these conditions were related." R. at 7950. Mr. Brown filed a Notice of Disagreement (NOD) with that decision, seeking a higher disability rating for his headaches. R. at 7890. Mr. Brown submitted a letter to VA in August 2008, again expressing his disagreement with the noncompensable disability rating awarded for headaches. R. at 7668-69. He stated that his "headaches are regular and have a bearing on [his] ability to live a normal life free of pain." R. at 7669.

The Board remanded Mr. Brown's claim in January 2012 for the RO to issue a Statement of the Case (SOC) regarding an increased initial rating for headaches. R. at 6090-6106. The RO issued an SOC in June 2013 continuing the noncompensable rating. R. at 5768-95. The RO explained that a compensable disability rating requires evidence that Mr. Brown's headaches were "prostrating attacks averaging one in two months over the last several months" and that there was no evidence "submitted to suggest that the veteran's headaches were prostrating." R. at 5794, 5832. Mr. Brown filed a Substantive Appeal the following month. R. at 5503. In August 2013 Mr. Brown submitted a brief in support of his appeal to the Board wherein he stated that he experiences "serious headaches that might accurately be described as 'prostrating' at least monthly from 2007 to the present." R. at 550; *see also* R. at 5497. He submitted a statement in support of the brief in which he explained that he "began experiencing regular severe headaches prior to 2007" and that "[o]n average, [he] experience[s] these headaches more frequently than once per month." R. at 5497. In May 2015, the Board noted that Mr. Brown was last afforded an examination in May 2007 and that his "[r]ecent statements suggest that his headaches may have worsened." R. at 4823. The Board therefore remanded the headache claim for a new examination. R. at 4796-4828.

Mr. Brown was afforded a VA compensation and pension examination in August 2016. R. at 1777-81. He reported that his headaches started after his in-service motorcycle accident in 1979, and that after the accident he had been unconscious for 3 days in a field covered in mud. R. at 1779. He stated that he had headaches 1 to 4 times weekly and that he is "in bed all the time due to either a headache or [in] anticipation of a headache developing." *Id.*

In September 2016, the RO increased Mr. Brown's disability rating for headaches to 50%. R. at 1831-40. The RO found that May 13, 2015, was "the earliest date it is factually ascertainable that an increase in disability had occurred based on the Board's finding that [his] headaches have

worsened in severity since [his] May 2007 examination." R. at 1839. The RO therefore assigned a May 13, 2015, effective date for the increased disability rating. *Id.*

Mr. Brown submitted an NOD with the September 2016 decision seeking an earlier effective date for the 50% rating for his headaches. R. at 1759-61. He argued that the effective date of the 50% rating "should be earlier than April 2000, possibly October 1, 1993." R. at 1761. He also argued that the "0% award for headaches effective May 7, 2007, was wrong." *Id.* In a March 2017, decision, the Board referred to the RO for adjudication a claim for "entitlement to an effective date earlier than May 13, 2015, for the award of a 50[%] evaluation for headaches, to include whether there was clear and unmistakable error (CUE) in a[] September 2016 rating decision." R. at 1611. The RO issued a decision in May 2018 continuing the effective date of May 13, 2015, for the award of a 50% disability rating for Mr. Brown's headaches and finding no CUE in the September 2016 rating decision. R. at 251-304.

Mr. Brown continued to disagree with the effective date of May 13, 2015, for the 50% rating for his headaches. R. at 128-30, 184-85. He claimed that he had been suffering from "severe headaches before his retirement from the Air Force in 1993" and that there was "no convincing evidence" that support's that his headaches increased in severity in May 2015. R. at 128. He therefore argued that the effective date of his award should be the date he retired from military service. *Id.* Mr. Brown also argued that he was entitled to a higher rate of SMC "due to the 50% ratings for headaches." R. at 184.

In the November 2018, decision here on appeal, the Board denied entitlement to an effective date earlier than May 13, 2015, for the award of a 50% disability rating; denied an effective date earlier than July 22, 2005, for his SMC award; and denied an effective date earlier than April 17, 2000, for his TDIU award. R. at 3-21. This appeal followed.

II. ANALYSIS

A. Headaches

Pursuant to 38 U.S.C. § 5110, which governs the assignment of an effective date for an award of benefits,

the effective date of an award based on an initial claim, or a supplemental claim, 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.

38 U.S.C. § 5110(a)(1); *see also* 38 C.F.R. § 3.400 (2019) (the effective date of a disability award generally "will be the date of receipt of the claim or the date entitlement arose, whichever is later").

A Board determination as to the proper effective date is a finding of fact that will not be overturned unless the Court finds the determination to be clearly erroneous. *Evans v. West*, 12 Vet.App. 396, 401 (1999). The degree of disability assigned to a condition under a rating code is also a finding of fact subject to the "clearly erroneous" standard of review. *See Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997). A finding of fact is clearly erroneous when the Court, after reviewing the entire evidence, "is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

In every decision, the Board must provide a statement of the reasons or bases for its determination "adequate to enable a claimant to understand the precise basis for the Board's decision, as well as to facilitate review in this Court." *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *see* 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56-57. To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *Gilbert*, 1 Vet.App. at 57.

The appellant's headaches are rated pursuant to 38 C.F.R. § 4.124a, Diagnostic Code (DC) 8100 (2019). DC 8100 provides for a maximum 50% disability rating for migraine headaches "[w]ith very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability." 38 C.F.R. § 4.124a, DC 8100. A 30% disability rating is assigned for migraines "[w]ith characteristic prostrating attacks occurring on an average once a month over last several months," a 10% disability rating is assigned for headaches "[w]ith characteristic prostrating attacks averaging one in 2 months over last several months," and a 0% rating is assigned where attacks are less frequent than an average of 1 in 2 months. *Id.*

The appellant argues that "the appropriate date for the start of service connected headaches is the date he retired from service, October 1, 1993." Appellant's Brief at 9. He concedes that he "did not specifically claim headaches . . . when he retired from service," but asserts that he had filed claims for service connection for a cervical spine condition and sinusitis and argues that

"[h]eadaches should have been viewed as secondary to these conditions." *Id.* The appellant argues that "VA should have assisted the veteran in perfecting his claim for headaches . . . [and] if they had done so, his claim for benefits for . . . headaches would have been filed in 1993." *Id.* The appellant also argues that the Board's finding that May 13, 2015, was the earliest date that it was factually ascertainable that his headaches were severe enough to warrant a 50% rating was clearly erroneous. Appellant's Brief at 9-11.

The Secretary correctly points out that following the October 2007 award of service connection for headaches, the appellant appealed only the issue of an increased disability rating for his service-connection award. Secretary's Brief at 10-11; R. at 7890-97, 7668-70. Although the Board decision addresses an earlier effective date for the increased disability rating for headaches, the Board did not specifically address whether an effective date before May 2007 is warranted. The appellant did not argue or point to any evidence to the Board or on appeal to this Court that he filed an NOD challenging the effective date of his original award of service connection for headaches. As the issue was neither appealed to the Board, raised by the appellant, or raised by the record, the appellant has not demonstrated any error in the Board not addressing that issue. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (appellant has the burden of demonstrating error).

Moreover, the appellant's argument that headaches should have been considered secondary to his cervical spine and sinusitis claims filed at the time he left service must be raised as a collateral attack on those claims, not on direct appeal of his award of service connection for headaches. If the appellant believes any prior final decisions of the RO or the Board contain clear and unmistakable error in not addressing an implied headaches claim, he is free to file an appropriate CUE claim at any time. *See Andrews v. Nicholson*, 421 F.3d 1278, 1282-84 (Fed. Cir. 2005); 38 C.F.R. § 20.1404(b) (2019) ("[A CUE motion] must set forth clearly and specifically the alleged clear and unmistakable error, or errors, of fact or law in the Board decision, the legal or factual basis for such allegations, and why the result would have been manifestly different."); *see also Russell v. Principi*, 3 Vet.App. 310, 314-15 (1992) (en banc) (a CUE claim cannot be raised for the first time before this Court).

The Secretary argues that, to the extent the appellant did properly appeal the effective date of the award of the 50% disability rating, the appellant does not point to evidence indicating an earlier date of the onset of "very frequent completely prostrating and prolonged attacks productive

of severe economic inadaptability." Secretary's Brief at 12 (quoting DC 8100). The Court agrees with the Secretary that the appellant's brief is lacking in clarity, as were his arguments presented to the Board. However, it is clear from the appellant's initial appeal of the October 2007 award of service connection, that he believed his headache condition was more severe than the RO found it to be when it assigned a noncompensable rating. R. at 7890-97, 7668-70; *see also* R. at 4-5. The November 5, 2018, Board decision is on direct appeal from that initial RO decision. R. at 4-5.

In denying a higher initial disability rating for the appellant's service-connected headaches, the Board found that "[c]ontrary to [the appellant's] lay assertions, the record evidence shows that, prior to May 13, 2015, his service-connected headaches are manifested by, at worst, less frequent attacks (i.e. a zero percent rating under DC 8100)." R. at 8. In support of that factual determination, the Board noted that a September 2000 treatment record showed that the appellant was diagnosed with "some headaches, sometimes severe"; that he complained of "chronic headaches" in July 2005; and, during a May 2007 VA brain and spinal cord examination, he complained of "headaches often," but was uncooperative and the examiner could not get any further information regarding the appellant's headaches. R. at 5-6. The Board also noted that the appellant denied headaches on a May 2013 VA Disabilities Benefits Questionnaire and during VA treatment visits in September 2013 and in February 2014. R. at 10. Although the Court recognizes the difficulty in assessing the severity and frequency of the appellant's headaches when the evidence consists of nonspecific terms such as "some," "sometimes," "chronic," and "often," the Board fails to explain why these terms do not demonstrate, for example, headaches "averaging one in 2 months over last several months." 38 C.F.R. § 4.124a, DC 8100 (criteria for a 10% disability rating); *see Moore v. Shinseki*, 555 F.3d 1369, 1373 (Fed. Cir. 2009) (holding that it is the duty of the rating specialist to apply the medical evidence of record to the criteria of the applicable rating schedule). The Board's failure to evaluate the evidence in terms of the criteria outlined in the applicable diagnostic code does not give the appellant sufficient information to understand the precise basis for the decision and frustrates judicial review. *See Allday*, 7 Vet.App. at 527.

The Board similarly fails to adequately explain its finding that "[t]he record evidence shows that the earliest factually ascertainable date for the assignment of a 50 percent rating for headaches is May 13, 2015[,] (the date of a Board decision remanding the [appellant's] claim for an updated examination to determine the current nature and severity of his service-connected headaches)." R. at 5. The Board noted that in May 2015, the Board "specifically noted that the

[appellant] recently asserted in lay statements that his disability had worsened since his most recent VA examination in May 2007." R. at 10. The Board does not explain why the Board's May 2015 remand acknowledging that the appellant's "[r]ecent statements suggest that his headaches may have worsened," R. at 4823, supports the conclusion that the "earliest factually ascertainable date for the assignment of a 50 percent rating for headaches is May 13, 2015," the date of the Board decision, R. at 5. This is particularly unclear in light of the fact that the "recent statements" the Board appeared to be referring to was an August 2013 statement reporting that he "began experiencing regular[,] severe headaches *prior to 2007*" and that "[o]n average, [he] experience[s] these headaches more frequently than once per month." R. at 5497 (emphasis added); *see also* R. at 4823.

The Board also found that the appellant's "apparent embroidering of the details regarding his in-service motorcycle accident with VA examiners in May 2007 and in August 2016 undercuts the probative value of the medical evidence obtained at these examinations." R. at 11-12. The Court also finds this conclusion to lack adequate reasons or bases. Although the Board must evaluate the credibility of the evidence, it is unclear why the Board concluded the August 2007 VA medical examination was sufficient to justify a 50% disability rating, but also concluded that the veteran's questionable recount of the events in 1979 undercut his statements regarding the severity of his headaches from 2007.

Because the Board does not adequately explain its decision denying an initial compensable disability rating for the appellant's service-connected headaches, the Court will remand the matter to the Board to provide an adequate statement of reasons or bases for its decision. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

B. SMC and TDIU

The Secretary argues in his brief that the appellant has not raised any arguments regarding the Board's denial of earlier effective dates for his SMC and TDIU awards and the Court should therefore deem those claims abandoned and dismiss the appeal of those matters. Secretary's Brief at 2-3. The appellant asserts in his reply brief that he "did not intend to abandon any claims that were addressed in the [Board] decision dated November 5, 2018." Reply Brief at 2.

Regarding his claim for an earlier effective date for his award of SMC, it appears that the appellant is arguing, or, more accurately, assuming without presenting any legal argument, that if he were to be granted an earlier effective date for his 50% disability rating for headaches, he might be entitled to an earlier effective date for SMC. However, the appellant's SMC award was effective July 22, 2005, and the appellant's 50% disability rating was not effective until May 2015. Therefore, it appears the appellant's 50% disability rating for headaches was not necessary to his SMC award in place nearly 10 years earlier. To the extent the appellant seeks an effective date earlier than May 2007 for his initial award of service connection for headaches, the Court has found that matter is not properly before this Court.

Therefore, even if a 50% disability rating for headaches could affect the appellant's effective date for his SMC, the disability rating would have to reach to earlier than July 22, 2005, and that issue is not before this Court. *See* 38 U.S.C. § 7252(a) (the Court's jurisdiction is generally limited to review of final Board decisions). Accordingly, the Court finds that the appellant has not met his burden of demonstrating error in the Board's decision denying an earlier effective date for his award of SMC. *See Hilkert*, 12 Vet.App. at 151; *see also Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court is unable to find error when arguments are undeveloped); *Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) (per curiam) ("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."), *vacated on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008) (per curiam order).

Similarly, although appellant asserts that he is not abandoning any issue decided by the Board, he has presented no legal argument in his opening or reply brief even suggesting a legal theory that would entitle him to an earlier effective date for his TDIU award. *See Locklear*, 20 Vet.App. at 41; *Coker*, 19 Vet.App. at 442. Accordingly, the appellant has not met his burden of establishing error in the Board's denial of an effective date earlier than April 17, 2000, for his TDIU award. *See Hilkert*, 12 Vet.App. at 151; *see also Locklear*, 20 Vet.App. at 41; *Coker*, 19 Vet.App. at 442.

III. CONCLUSION

Based on the foregoing analysis, the appellant's and the Secretary's briefs, and a review of the record on appeal, the Board's November 5, 2018, decision, to the extent it denied a disability

rating in excess of 0% effective before May 13, 2015, for the appellant's service-connected headaches is VACATED and the matter is REMANDED for readjudication consistent with this decision. The Board's decision, to the extent it denied earlier effective dates for the appellant's awards of SMC and TDIU is AFFIRMED.

DATED: April 27, 2020

Copies to:

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