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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 19-2024

MARIO N. DACOSTA, APPELLANT,

V.

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

Before BARTLEY, *Chief Judge*.

MEMORANDUM DECISION

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

BARTLEY, *Chief Judge*: Veteran Mario N. Dacosta appeals through counsel a December 14, 2018, Board of Veterans' Appeals (Board) decision finding that he had waived or withdrawn his appeal of the issue of entitlement to an initial disability evaluation in excess of 30% for service-connected tension headaches. Record (R.) at 4-11.[1] For the reasons that follow, the Court will reverse the Board's finding that the veteran had waived or withdrawn his appeal of that issue and remand that matter for further development, if necessary, and initial adjudication consistent with this decision.

I. FACTS

Mr. Dacosta served on active duty in the U.S. Air Force from January 1989 to January 2013. R. at 1115. In February 2013, a VA regional office (RO) granted him service connection

[1] In the same decision, the Board granted an initial 30% evaluation for tension headaches and service connection for allergic rhinitis. R. at 5-9. Because those determinations are favorable to Mr. Dacosta, the Court will not disturb them. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007) ("The Court is not permitted to reverse findings of fact favorable to a claimant made by the Board pursuant to its statutory authority."). The Board also remanded a claim for service connection for coronary artery disease, including as secondary to service-connected hypertension. R. at 9-12. Because a remand is not a final decision of the Board subject to judicial review, the Court does not have jurisdiction to consider that claim at this time. *See Howard v. Gober*, 220 F.3d 1341, 1334 (Fed. Cir. 2000); *Breeden v. Principi*, 17 Vet.App. 475, 478 (2004) (per curiam order); 38 C.F.R. § 20.1100(b) (2019).

for tension headaches and assigned a noncompensable evaluation under 38 C.F.R. § 4.124a, Diagnostic Code (DC) 8100.[2] R. at 1131-37.

Mr. Dacosta timely disagreed with that decision in September 2013 by filing a VA Form 21-0958, Notice of Disagreement (NOD). R. at 390. In the box on that form for "Specific Issue of Disagreement," he wrote "service connection for tension headaches noncompensable evaluation." *Id*. (capitalization altered). In the box next to that for "Specific Area of Disagreement," he marked "Evaluation of Disability," and in the box for "Percentage (%) Sought (if known)," he wrote "30%." *Id*. He attached to his NOD a daily log of headaches, which detailed the severity, frequency, and duration of headache attacks between June and September 2013. R. at 389.

In April 2016, the RO issued a Statement of the Case denying a compensable evaluation for headaches. R. at 144-88. In June 2016, the veteran filed a VA Form 9, Substantive Appeal, requesting "[e]ntitlement to an evaluation in excess of 0 percent for [] tension headaches." R. at 108. He described worsening headaches, but did not identify a particular evaluation level being sought on appeal. *See* R. at 107-08.

In the December 2018 decision currently on appeal, the Board awarded Mr. Dacosta an increased initial evaluation of 30% for his service-connected tension headaches. R. at 7-8. The Board characterized this as a full grant of benefits sought and did not consider entitlement to a headache evaluation in excess of 30% because it found that the veteran's request for a 30% evaluation in his NOD constituted both a waiver and a withdrawal of an appeal of any evaluation greater than 30%. R. at 8-9. This appeal followed.

II. JURISDICTION & STANDARD OF REVIEW

Mr. Dacosta's appeal is timely and the Court has jurisdiction to review the December 2018 Board decision pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate in this case. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

[2] DC 8100 provides a 50% evaluation for migraines with very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability, a 30% evaluation for migraines with characteristic prostrating attacks occurring on an average once a month over the last several months, a 10% evaluation for migraines with characteristic prostrating attacks averaging one in 2 months over the last several months, and a noncompensable evaluation for migraines with less frequent attacks. 38 C.F.R. § 4.124a, DC 8100 (2019).

An appellant may limit the scope of an appeal by clearly expressing an intent to exclude certain issues from appellate consideration, *see AB v. Brown*, 6 Vet.App. 35, 39 (1993), or by withdrawing issues already certified for appeal, *see Hanson v. Brown*, 9 Vet.App. 29, 31-32 (1996); 38 C.F.R. § 20.204 (2019); *see also Murphy v. Shinseki*, 26 Vet.App. 510, 514 (2014) (acknowledging that "the appellant generally controls the scope of appellate review"). However, in a claim for an increased evaluation, "the claimant will generally be presumed to be seeking the maximum benefit allowed by law and regulation" and "such a claim remains in controversy where less than the maximum available benefit is awarded." *AB*, 6 Vet.App. at 38. When determining whether an appellant limited the scope of an appeal or withdrew an issue from appellate consideration, VA is required to liberally construe an appellant's submissions. *Kalman v. Principi*, 18 Vet.App. 522, 524 (2004) (citing *EF v. Derwinski*, 1 Vet.App. 324, 326 (1991)).

The Board's determination in this regard is a finding of fact that the Court reviews under the "clearly erroneous" standard set forth in 38 U.S.C. § 7261(a)(4). *Id.*; *Hanson*, 9 Vet.App. at 32. "A factual finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hersey v. Derwinski*, 2 Vet.App. 91, 94 (1992) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

As with any finding on a material issue of fact and law presented on the record, the Board must support its determinations regarding the scope of an appeal with adequate reasons or bases that enable the claimant to understand the precise basis for that determination and facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *Verdon v. Brown*, 8 Vet.App. 529, 533 (1996); *Gilbert v. Derwinski*, 1 Vet.App. 49, 57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence that it finds persuasive or unpersuasive, and provide reasons for its rejection of 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).

III. ANALYSIS

Mr. Dacosta argues that the Board clearly erred in finding that he had limited the scope of his appeal to exclude entitlement to a headache evaluation in excess of 30% because his NOD did not expressly waive or withdraw that issue from appellate consideration and his Substantive

Appeal broadly asserted entitlement to a compensable headache evaluation without qualification. Appellant's Brief (Br.) at 8-9; Reply Br. at 1-2. He asks that the Court reverse the Board's finding of waiver or withdrawal and direct the Board to adjudicate his entitlement to a headache evaluation in excess of 30% in the first instance. Appellant's Br. at 9, 20; Reply Br. at 11-12. In the alternative, Mr. Dacosta asserts that the Board provided inadequate reasons or bases for its finding that he waived or withdrew his appeal of that issue, necessitating remand. Appellant's Br. at 9-20. The Secretary disputes these contentions and urges the Court to affirm the Board decision because the Board's finding in this regard had a plausible basis in the record and was adequately explained. Secretary's Br. at 4-16.

The Court agrees with the veteran that the Board clearly erred in finding that he limited his appeal solely to consideration of a headache evaluation of 30% or less. Although Mr. Dacosta indicated on his September 2013 NOD that he was seeking a 30% evaluation for headaches, R. at 390, he did not clearly express an intent, in that document or elsewhere in the record, to waive or withdraw appellate consideration of an evaluation in excess of 30%. *See AB*, 6 Vet.App. at 39 (requiring a "clearly expressed intent" to limit a claim or appeal to a particular disability evaluation). Nor did he ever state that an award of a 30% evaluation would "fully satisfy" his appeal, as the Board indicated. R. at 8. To the contrary, Mr. Dacosta's NOD, when read sympathetically and in the context of the evidence he submitted along with that document, *see Kalman*, 18 Vet.App. at 524; *EF*, 1 Vet.App. at 326, expresses his belief that he was entitled to *at least* a 30% evaluation for headaches, not that he intended to limit his appeal to consideration of that particular evaluation.

Significantly, Mr. Dacosta asserted in his NOD that a June 2012 VA progress note showed that he suffered from "headaches every two weeks, sometimes weekly," R. at 391, which—if those headaches were completely prostrating, prolonged, and productive of severe economic inadaptability—would be frequent enough to support a 50% evaluation, *see* 38 C.F.R. § 4.124a, DC 8100. Along with his NOD, the veteran submitted a daily log of headaches from June to September 2013, which detailed headaches every week, the duration of those headaches, and the effect that they had on his functioning, including the degree to which they interfered with his work. R. at 389. Although Mr. Dacosta indicated in his NOD that he was seeking a 30% headache evaluation, he also referenced the attached headache log and asked the RO to "make a favorable decision on [his] claim," R. at 391, broad language that does not in any way convey an intent to

waive or withdraw an appeal of an evaluation in excess of 30%. Because an appellant's reference to and argument for a particular evaluation does not abrogate his or her appeal of entitlement to a higher evaluation where there has been no expression of a clear intent to so limit the appeal, *see AB*, 6 Vet.App. at 39, the Court concludes that the Board clearly erred in construing Mr. Dacosta's appeal so narrowly in the absence of such an expression of intent and in light of his argument for and submission of evidence that could support a higher evaluation.

In addition, the Board's treatment of Mr. Dacosta's NOD is contrary to the Secretary's stated policy of liberally interpreting similar statements in NODs. When the Secretary issued the final rule requiring the use of standard claims and appeals forms, he addressed a similar situation and explained that VA would not construe a claimant's request for a particular benefit in an NOD as limiting the scope of his or her appeal. The Secretary explained:

> 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).

Standard Claims and Appeals Forms, 79 Fed.Reg. 57,660, 57,685 (Sept. 23, 2014) (emphasis added). And when the Secretary proposed the standard claims and appeals forms rule, he stated that it was "not VA's intention to be overly technical" when reviewing these forms; rather, the purpose of the rule was "the orderly and efficient processing of veterans' claims and appeals, not the exclusion of legitimate appeals." Standard Claims and Appeals Forms, 78 Fed.Reg. 65,490, 65,500 (proposed Oct. 31, 2013). Yet, despite VA's stated policy that the identification of a particular effective date or evaluation level in an NOD does not abrogate an appeal of a more beneficial effective date or evaluation level, the Board in this case construed Mr. Dacosta's identification of a 30% headache evaluation in his NOD as a waiver or withdrawal of his appeal of an evaluation in excess of 30%. R. at 8-9. Absent any indication that Mr. Dacosta intended to limit his appeal in this manner, the Court cannot accept the Board's overly technical and disadvantageous reading of his NOD. *See* 78 Fed.Reg. 65,490, 65,500; 79 Fed.Reg. at 57,685; *see also AB*, 6 Vet.App. at 38.

But even if that weren't the case, the evidence of record that postdates the NOD, including Mr. Dacosta's Substantive Appeal, undermines the Board's finding of waiver or withdrawal. After

the veteran filed his NOD in September 2013, he submitted evidence that his headaches had gotten worse—namely, a May 2016 private treatment record reflecting "severe and significant migraines and headaches," including at least one attack per month that does not respond to medication and renders him "completely unable to perform or do any of his job duties." R. at 103; *see* R. at 105. Mr. Dacosta attached a copy of that medical record to his June 2016 Substantive Appeal, where he described more severe and frequent headaches than those that he detailed in his NOD. R. at 108. Specifically, he stated that he now had 2 to 3 headaches per week, with "at least 1 severe headache per month" that "caused [him] to miss numerous work days because [he] cannot perform [his] assigned work." R. at 108. Mr. Dacosta concluded his Substantive Appeal by asking the Board for a headache evaluation "in excess of 0[%]," without referencing a particular evaluation level or indicating that he would be satisfied with an evaluation less than the maximum allowed by law. *Id*. This unqualified request, along with his submission of evidence of worsening headaches, further contradicts the Board's finding that the veteran intended to waive or withdraw appellate consideration of a headache evaluation in excess of 30%.

After considering the entire record—viewed sympathetically, *see Kalman*, 18 Vet.App. at 524; *EF*, 1 Vet.App. at 326, and in light of the presumption that an appellant is seeking the maximum benefit allowed by law and regulation absent an expression of clear intent to the contrary, *see AB*, 6 Vet.App. at 38—the Court is left with the definite and firm conviction that the Board committed a mistake in finding that Mr. Dacosta waived or withdrew his appeal of the issue of entitlement to a headache evaluation in excess of 30%. *See Hersey*, 2 Vet.App. at 94. Therefore, the Court will reverse that clearly erroneous finding by the Board and remand the matter for further development, if necessary, and initial adjudication of that issue. *See Deloach v. Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) (explaining that reversal is appropriate "where the Board has performed the necessary factfinding and explicitly weighed the evidence" and this Court, based "on the entire evidence, . . . is left with the definite and firm conviction that a mistake has been committed").

The veteran is free on remand to present any additional arguments and evidence to the Board pertinent to the issue of entitlement to a headache evaluation in excess of 30% in accordance with *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). The Court reminds the Board that "[a] remand is meant to entail a critical examination of the justification for [the Board's] decision," *Fletcher v. Derwinski*,

1 Vet.App. 394, 397 (1991), and must be performed in an expeditious manner in accordance with 38 U.S.C. § 7112.

IV. CONCLUSION

Upon consideration of the foregoing, the Board's December 14, 2018, finding that Mr. Dacosta waived or withdrew his appeal of the issue of entitlement to an initial evaluation in excess of 30% for service-connected tension headaches is REVERSED and that matter is REMANDED for further development, if necessary, and initial adjudication consistent with this decision. The balance of the appeal is DISMISSED.

DATED: May 12, 2020

Copies to:

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