

**BOARD OF VETERANS' APPEALS**

**DEPARTMENT OF VETERANS AFFAIRS**

**WASHINGTON, DC 20420**

IN THE APPEAL OF

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DOCKET NO. 08-14 456

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DATE

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On appeal from the  
Department of Veterans Affairs Regional Office in Waco, Texas

**THE ISSUE**

Entitlement to an initial rating in excess of 30 percent for migraines.

**REPRESENTATION**

Veteran represented by: Disabled American Veterans

**WITNESSES AT HEARING ON APPEAL**

The Veteran and his spouse

**ATTORNEY FOR THE BOARD**

N. Holtz, Counsel

## INTRODUCTION

The Veteran served on active duty from May 1979 to May 2007.

This case comes before the Board of Veterans' Appeals (Board) on appeal from a July 2007 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Salt Lake City, Utah. Original jurisdiction over this appeal was later transferred to the RO in Waco, Texas.

The Veteran and his spouse presented testimony before the undersigned at a July 2010 hearing. A transcript of the hearing has been associated with the claims file.

Following a May 2012 remand to the Agency of Original Jurisdiction (AOJ) for additional development, the Board granted an initial rating of 30 percent for the Veteran's migraines in a September 2014 decision. The Veteran appealed, and the Court of Appeals for Veterans Claims (Court) set aside the Board's decision and remanded the matter to the Board in February 2016.

## FINDING OF FACT

For the entire initial rating period on appeal, the Veteran's migraines have been manifested by frequent, prolonged, prostrating attacks capable of producing severe economic inadaptability.

## CONCLUSION OF LAW

For the entire initial rating period on appeal, the criteria for a 50 percent disability rating for migraines have been met. 38 U.S.C.A. §§ 1155, 5107 (West 2014); 38 C.F.R. §§ 4.3, 4.7, 4.21, 4.124a, Diagnostic Code 8100 (2015).

## REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran seeks an initial rating greater than 30 percent for his service-connected migraines. Considering the rules governing the benefit of the doubt, 38 U.S.C.A. § 5107; 38 C.F.R. §§ 4.3, 4.7, the Board finds that a 50 percent rating is warranted.

## I. VA's Duties to Notify and Assist

In the September 2014 decision, the Board determined that all duties to notify and assist under the Veterans Claims Assistance Act of 2000 (VCAA) had been met. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2014); 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.326(a) (2015). The Veteran did not dispute this finding in his appeal to the Court, and no facts related to VA's duties in this regard have changed since the 2014 decision. As such, further discussion of VCAA duties is not necessary.

## II. Increased Initial Rating for Migraines

Disability evaluations are determined by the application of the Schedule for Rating Disabilities (Rating Schedule), 38 C.F.R. Part 4 (2015). The percentage ratings contained in the Rating Schedule represent, as far as can practicably be determined, the average impairment in earning capacity resulting from diseases and injuries incurred or aggravated during military service and their residual disorders in civil occupations. 38 U.S.C.A. § 1155 (West 2014); 38 C.F.R. §§ 3.321(a), 4.1 (2015).

Where there is a question as to which of two evaluations shall be applied, the higher rating will be assigned if the disability picture more nearly approximates the criteria for that rating; otherwise, the lower rating will be assigned. 38 C.F.R. § 4.7 (2015). When there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the matter, the benefit of the doubt in resolving each such issue shall be given to the claimant. 38 U.S.C.A. § 5107(b) (West 2014); 38 C.F.R. § 4.3 (2015).

The Veteran's migraines are currently rated at 30 percent under 38 C.F.R. § 4.124a, Diagnostic Code 8100 (2015). A higher, 50 percent rating is warranted where there is very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability.

In its prior decision, the Board determined that a 50 percent rating was not warranted because the Veteran does not suffer from "very frequent prostrating and prolonged attacks" and because there was "no indication of his migraine symptoms being productive of severe economic inadaptability." *See* September 2014 Decision, at 11. The Court found the Board's reasons and bases in support of these determinations to be inadequate, noting that the Board failed to "explain the meaning ascribed to 'completely prostrating' and 'prolonged attacks' or explain why the evidence did not satisfy these factors." *See* February 2016 Court Decision, at 2. The Court also held that the Board failed to adequately support its finding that record did not evince severe economic inadaptability. *Id.* at 3.

Upon further review, there is sufficient evidence of record to support each of the necessary prongs for a 50 percent rating: (a) frequent completely prostrating and prolonged attacks, (b) that are capable of producing severe economic inadaptability. 38 C.F.R. § 4.124a, Diagnostic Code 8100 (2015); *Pierce v. Principi*, 18 Vet. App. 440, 445 (2004).

First, as to whether there are "very frequent completely prostrating and prolonged attacks", the evidence is somewhat ambiguous, but is ultimately sufficient to consider the attacks frequent, prolonged, and prostrating, when resolving reasonable doubt in favor of the Veteran. 38 C.F.R. § 4.3 (2015). In April 2007, he reported three to four headaches each month, with durations of between five and 40 minutes, though he had not had headaches in the previous year. *See* April 2007 VA examination report. His headaches were accompanied by symptoms of nausea, weakness, fatigue, and blurred vision. A year later, in July 2008, he asserted that he had four headaches with pain per month, but experienced visual disruptions that could be blinding between three and nine times per month. *See* Decision Review Officer Hearing Transcript, at 2, 3. His fullest description of his headaches occurred at his July 2010 Board hearing; at that time, he described headache pain

reaching a level of eight or nine on a scale of one-to-ten, and stated that the headaches would last between one and seven days. *See* Travel Board Hearing Transcript, at 14. He sometimes went blind due to the headaches, a condition that could last up to 45 minutes, and visual phenomena occurred multiple times per week, and sometimes up to eight consecutive days. *Id.* at 10. His spouse testified that blindness had once occurred three times in a single day. *Id.* at 16. An August 2010 private treatment record noted recent, left-sided headache pain a few times a week, which could last a couple of hours to a few days.

Later, at an October 2012 VA examination, the Veteran reported that the headaches lasted between two and fourteen days at a time, and that his pain was usually bearable enough to continue working except for approximately once or twice a year, when he would have to stay home in bed, sometimes for two days at a time. The examiner determined that the Veteran had characteristic prostrating attacks of migraine headache pain less than once every two months, and no prostrating attacks of non-migraine headache pain. The examiner found that the Veteran suffers from cephalgia absent migraine or acephalgic migraine, consisting mainly of symptoms of aura, dizziness, and loss of vision, with occasional headache pain. In a January 2013 statement, the Veteran disputed a notation in the October 2012 VA examination report, stating that he had informed the examiner that his headaches lasted five to seven days, rather than between one and two.

Based on this evidence, the Board concludes that the attacks are frequent, in that they occur a few times each month, and sometimes multiple times per week. The criteria for a 30 percent rating cover attacks that occur on average once per month; considering that these attacks occur much more frequently than once per month, it is evident that the frequency of the Veteran's attacks is not addressed by the 30 percent criteria.

Many of the attacks are prolonged as well; the evidence is clear that the attacks often last multiple days at a time, with a single headache sometimes persisting for up to two weeks.

They are also, at least at times, completely prostrating, even if not for the entire length of the headache. The Veteran is not blind, but his headaches render him sightless for up to 45 minutes at a time. The Board has previously found this testimony credible, and does here again. While “prostrating” is not defined, it is evident that, for a non-blind individual, the complete loss of sight is effectively prostrating; considering the Veteran’s statements that he must lie down when he becomes blind, and without evidence to the contrary, the Board finds that the headache effectively grounds the Veteran when he is unable to see.

The second prong of the rating criteria concerns whether the headache is “productive of severe economic inadaptability.” This term has not been clearly defined by regulations or by case law. The Court has noted that “productive of” can either have the meaning of “producing” or “capable of producing.” *Pierce*, 18 Vet. App. at 445. Thus, migraines need not actually “produce” severe economic inadaptability to warrant the 50 percent rating. *Id.* at 445-46. Further, “economic inadaptability” does not mean unemployability, as such would undermine the purpose of regulations pertaining to a TDIU. *Id.* at 446; *see also*, 38 C.F.R. § 4.16 (2015). The migraines must be, at minimum capable of producing “severe” economic inadaptability for a 50 percent rating.

The evidence documents that the symptoms discussed above, especially including the prolonged nature of the headaches and the frequent loss of vision, impact the Veteran’s employment to a slight degree, causing him to miss multiple days of work per year. As discussed in the prior Board decision, this impact has been limited by the fact that the Veteran’s employer has been flexible with him as he deals with his disability. Nevertheless, the fact that he has to date not suffered severe economic impacts does not necessitate a finding that the headaches are not *capable of producing* severe economic inadaptability. *Pierce*, 18 Vet. App. at 445. The Veteran is benefitted from working for an employer that adjusts to his needs, but the disability remains severe enough to potentially cause severe economic inadaptability due to the symptoms of blindness and the prolonged nature of the attacks.

As the headaches are frequent, prolonged, and prostrating, and are capable of producing severe economic inadaptability, the Board finds that an initial 50 percent rating is warranted. 38 C.F.R. § 4.124a, Diagnostic Code 8100 (2015).

### III. Extraschedular Consideration

VA's schedule of disability ratings is based on average impairment in earning capacity in civil occupations from specific injuries or combinations of injuries. 38 U.S.C.A. § 1155; 38 C.F.R. § 3.321(a) (2015). Where the ratings are inadequate to address the Veteran's symptomatology, he may be entitled to an extraschedular rating. 38 C.F.R. § 3.321(b)(1) (2015). Referral for extraschedular consideration "may be based on the collective impact of [a] veteran's disabilities." *Johnson v. McDonald*, 762 F.3d 1362, 1365.

In *Thun v. Peake*, the Court provided a framework for determining whether an extraschedular rating is warranted. 22 Vet. App. 111, 115 (2008). In the first step, the Board must determine whether the evidence "presents such an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate." *Id.* If so, the Board must determine whether the claimant's exceptional disability picture exhibits other related factors such as "marked interference with employment" or "frequent periods of hospitalization." *Id.* at 116. If these two prongs are met, then the Board is to refer the matter to the Under Secretary for Benefits or the Director of the Compensation and Pension Service for consideration. *Id.*

In this case, the Veteran does not meet the first prong of the *Thun* analysis, as there is no suggestion that the ratings are inadequate. First, the Veteran has not claimed that the available schedular ratings are inadequate. Second, the evidence of record does not itself suggest that extraschedular consideration is warranted. *Yancy v. McDonald*, 27 Vet. App. 484, 495 (2016) (noting that the issue of whether referral for extraschedular consideration is warranted must be argued by the claimant or reasonably raised by the record). In this regard, the Board's grant of a 50 percent rating recognizes the fact that the Veteran does not necessarily meet all of the criteria for that rating in full. While his disability may be capable of producing

severe economic inadaptability, it has not; in that sense, the disability rating provides a greater benefit to him than to an individual who did actually suffer severe economic inadaptability as a result of migraines. Furthermore, as discussed above, the rating criteria consider extended periods of completely prostrating attacks, whereas the Veteran's symptoms only produce short-term prostrating attacks. There are no additional symptoms identified that are not covered under Diagnostic Code 8100; the rating criteria fully and specifically contemplate his symptoms. *Thun*, 22 Vet. App. at 115. In short, there is no indication in the record that the average industrial impairment from the Veteran's migraines would be in excess of that contemplated by the ratings assigned for the initial rating period on appeal; the Veteran's disability picture is not shown to be exceptional or unusual. Therefore, referral for assignment of an extraschedular evaluation in this case is not in order. 38 C.F.R. § 3.321(b) (2015).

#### IV. Total Disability Rating Based on Unemployability

As discussed in the September 2014 decision, the record does not suggest an inability on the part of the Veteran to secure or follow a substantially gainful occupation, and he specifically stated that he is employed and not seeking entitlement to a total disability rating based on unemployability due to service-connected disability (TDIU). *See* March 2009 statement. As such, a claim for TDIU has not been raised by the record. *Rice v. Shinseki*, 22 Vet. App. 447 (2009).

#### ORDER

A 50 percent rating for migraines is granted, subject to the laws and regulations governing the payment of monetary benefits.

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Donnie R. Hachey  
Veterans Law Judge, Board of Veterans' Appeals





## YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (BVA or Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. We will return your file to your local VA office to implement the BVA's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. None of these things is mutually exclusive - you can do all five things at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court *before* you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

**How long do I have to start my appeal to the court?** You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you*, you will have another 120 days from the date the BVA decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time*. Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

**How do I appeal to the United States Court of Appeals for Veterans Claims?** Send your Notice of Appeal to the Court at:

**Clerk, U.S. Court of Appeals for Veterans Claims  
625 Indiana Avenue, NW, Suite 900  
Washington, DC 20004-2950**

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: <http://www.uscourts.cavc.gov>, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office.

**How do I file a motion for reconsideration?** You can file a motion asking the BVA to reconsider any part of this decision by writing a letter to the BVA clearly explaining why you believe that the BVA committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that such letter be as specific as possible. A general statement of dissatisfaction with the BVA decision or some other aspect of the VA claims adjudication process will not suffice. If the BVA has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified will not be considered. Send your letter to:

**Director, Management, Planning and Analysis (014)  
Board of Veterans' Appeals  
810 Vermont Avenue, NW  
Washington, DC 20420**

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

**How do I file a motion to vacate?** You can file a motion asking the BVA to vacate any part of this decision by writing a letter to the BVA stating why you believe you were denied due process of law during your appeal. *See* 38 C.F.R. 20.904. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

**How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error?** You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400 -- 20.1411, and *seek help from a qualified representative before filing such a motion*. See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

**How do I reopen my claim?** You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. *See* 38 C.F.R. 3.156(a).

**Can someone represent me in my appeal?** Yes. You can always represent yourself in any claim before VA, including the BVA, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: <http://www.va.gov/vso/>. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before the VA, you can get information on how to do so at the Court's website at: <http://www.uscourts.cavc.gov>. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: <http://www.vetsprobono.org>, [mail@vetsprobono.org](mailto:mail@vetsprobono.org), or (855) 446-9678.

**Do I have to pay an attorney or agent to represent me?** An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. *See* 38 C.F.R. 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

**Fee for VA home and small business loan cases:** An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

**Filing of Fee Agreements:** In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to the Secretary at the following address:

**Office of the General Counsel (022D)  
810 Vermont Avenue, NW  
Washington, DC 20420**

The Office of General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of General Counsel. *See* 38 C.F.R. 14.636(i); 14.637(d).