

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Vet. App. No. 23-4965


Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,
Appellee.

APPELLANT'S BRIEF

Spencer Jolicoeur, Attorney
VA Disability Group PLLC
7837 S Sprinkle Rd
Portage, MI 49002
Phone: (844) 838-5297
Email: spencer@vadisabilitygroup.com

TABLE OF CONTENTS

STATEMENT OF THE ISSUES.....1

STATEMENT OF THE CASE.....2

SUMMARY OF THE ARGUMENT.....4

STANDARD OF REVIEW.....5

ARGUMENT.....6, 8, 10,12, 14

 I) The Board erred when it failed to consider all the relevant evidence of record and the Board erred when it failed to discuss potentially applicable provisions of law and regulation.

 II) The Board erred when it failed to address material evidence favorable to the appellant. The Veteran’s medical treatment record, noting a prescription of sumatriptan, by itself is a material piece of evidence.

 III) The Board erred when it failed to address material evidence favorable to the appellant. The Veteran’s medical treatment record, noting a prescription of sumatriptan, when considered with previous evidence of record is a material piece of evidence.

 IV) The Board failed to provide an adequate statement of the reasons or bases for its findings and conclusions on all material issues of fact and law. The Board's statement of reasons and bases was insufficient, making it impossible for the appellant to understand the precise basis for the Board’s decision.

 V) The Board erred when it failed to substantially comply with the Court of Appeals for Veterans Claims (CAVC) remand terms.

CONCLUSION.....15

TABLE OF AUTHORITIES

CASES

Allday v. Brown, 7 Vet. App. 517, 527 (1995).....	8, 10, 12
Butts v. Brown, 5 Vet. App. 532 (1993).....	5
Caluza v. Brown, 7 Vet. App. 498, 7 . 498, 506 (1995).....	8, 10
Donnellan v. Shinseki, 24 Vet. App. 167, 176 (2010).....	14
Futch v. Derwinski, 2 Vet. App. 204, 206 (1992).....	5
Gabrielson v. Brown, 7 Vet. App. 36, 39-40 (1994).....	8,10, 12
Gilbert v. Derwinski, 1 Vet. App. 49, 56-57 (1990).....	8,10, 12
Jones v. Shinseki, 26 Vet. App. 56, 63 (2012).....	4, 5, 6, 7, 12, 13, 14, 15
Joyce v. Nicholson, 19 Vet. App. 36, 42-46 (2005).....	5
Schafrath v. Derwinski, 1 Vet. App. 589, 593 (1991).....	6, 7
Stegall v. West, 11 Vet. App. 268, 271 (1998).....	14

STATUTES

38 U.S.C. § 7261(a)(1).....5
38 U.S.C. § 7104(a), (d)(1).....6, 7, 8, 10, 12

REGULATIONS

38 C.F.R. 3.2501.....6
38 C.F.R. §4.0124a.....6, 8, 10
38 C.F.R. 3.156.....8, 10
38 C.F.R. 4.97.....14

CITATIONS TO THE RECORD BEFORE THE AGENCY

R-5 to R-13 (AMA BVA Decision July 2023).....3, 12, 15

R-467 to 468 (Joint Motion for Partial Remand (JMPR) February 2023).....3, 7, 13, 14

R-929 (AMA BVA Decision July 2022).....3

R-958 (Legacy BVA Decision April 2022).....3

R-999 (Joint Motion for Partial Remand (JMPR) January 2022).....3

R-1077 (Legacy BVA Decision May 2021).....2

R-1108 (AMA Notice of Disagreement).....2

R-1168 (Supplemental Statement of the Case March 2021).....2

R-1521 (Medical Treatment Record (Sumatriptan provides some relief)).....7, 9

R-1656 (Medical Treatment Record (April 2020 Sumatriptan Prescription)).....11

R-1676 (Legacy BVA Legacy Decision April 2020).....2

R-1873 to 1894 (BVA Hearing Transcript February 2020).....2,11

R-2446 (Veteran’s 2019 Migraine Symptom Log).....11

R-2648 (VA Form 9).....2

R-2718 (Statement of the Case May 2018).....2

R-3674 (Private 2018 Migraine DBQ).....11

R-3985 (Legacy Notice of Disagreement).....2

R-4055 (VA Rating Decision October 2017).....2

R-4072 (VA 2017 Migraine DBQ).....11

STATEMENT OF THE ISSUES

- I) The Board erred when it failed to consider all the relevant evidence of record and the Board erred when it failed to discuss potentially applicable provisions of law and regulation.
- II) The Board erred when it failed to address material evidence favorable to the appellant. The Veteran's medical treatment record, noting a prescription of sumatriptan, by itself is a material piece of evidence.
- III) The Board erred when it failed to address material evidence favorable to the appellant. The Veteran's medical treatment record, noting a prescription of sumatriptan, when considered with previous evidence of record is a material piece of evidence.
- IV) The Board failed to provide an adequate statement of the reasons or bases for its findings and conclusions on all material issues of fact and law. The Board's statement of reasons and bases was insufficient, making it impossible for the appellant to understand the precise basis for the Board's decision.
- V) The Board erred when it failed to substantially comply with the Court of Appeals for Veterans Claims (CAVC) remand terms.

STATEMENT OF THE CASE

A rating decision was issued under the legacy system in October 2017 (R-4055). This VA rating decision awarded 0 percent for the Veteran's service-connected migraines. The Veteran submitted a timely notice of disagreement (R-3985). The Veteran appealed the evaluation and effective date of his migraines. The VA issued a Statement of the Case in May 2018 (R-2718). The Veteran submitted a VA form 9 appealing the Statement of the Case in June 2018 (R-2648). The Veteran provided testimony at a February 2020 Board of Veterans' Appeals (Board) hearing before a Veterans Law Judge. A transcript of the hearing is of record. (R-1873). In April 2020 the BVA issued a decision denying an early effective date for migraines and remanded entitlement to initial compensable rating for migraines (R-1676).

In March 2021, the agency of original jurisdiction (AOJ) issued a supplemental statement of the case (SSOC) (R-1168). The Veteran submitted a May 2021 VA Form 10182, Decision Review Request: Board Appeal, identifying the March 2021 SSOC (R-1108). In May 2021, VA Form 10182, Decision Review Request, the Veteran elected the Evidence Submission docket (R-1108). The BVA issued a May 17, 2021, legacy decision denying a compensable rating for the Veteran's service-connected migraine (R-1077). This May 2021 legacy BVA decision was appealed to the CAVC. In January 2022 the Court issued a Joint Motion for Partial Remand (JMPR), in which the parties agreed the portion of the May 2021 legacy Board decision denying the Veteran an initial compensable rating for migraines headaches should be vacated and the issue remanded

for further development (R-999). Furthermore, the Board should address the jurisdictional issue (R-999). In an April 2022 legacy Board decision, the issue of a compensable rating for migraine headaches was dismissed under the legacy framework, as the Veteran had opted into the AMA via his May 2021 VA Form 10182 (R-958).

A Board decision was issued under the AMA in July 2022, in which the Veteran was again denied an initial compensable rating for migraine headaches (R-929). The Veteran appealed the July 2022 Board decision to CAVC. In February 2023, the Court issued a JMPR, in which the parties agreed that the portion of the July 2022 AMA Board decision denying the Veteran an initial compensable rating for migraines headaches should be vacated and the issue remanded for further development (R-467). A BVA decision was issued as a result of this remand. This BVA decision was issued in July 2023 and this BVA decision denied a compensable rating for the Veteran's service-connected migraine headaches (R-5). This July 2023 BVA decision was appealed to the CAVC in August 2023.

SUMMARY OF THE ARGUMENT

The appellant asserts that the Board of Veterans Appeals (the Board) committed several errors in its decision denying a compensable rating for the Veteran's service-connected migraines. Specifically, the appellant argues that the Board failed to consider relevant evidence, neglected to discuss the applicable laws and regulations, failed to address material evidence favorable to the appellant, failed to provide adequate reasons and bases for its conclusions, and did not substantially comply with the Court of Appeals for Veterans Claims (the Court) remand terms.

More specifically, the Board erred by not considering all the relevant evidence of record, such as the Veteran's medical treatment record noting an April 2020 sumatriptan prescription and the Veteran's medical treatment record that noting the Veteran's sumatriptan provides him with "some relief." The Board failed to discuss relevant and applicable case law such as *Jones v. Shinseki*, 26 Vet. App. 56, 63 (2012). The Board overlooked material evidence favorable to the appellant. The Veteran's medical treatment record, noting a prescription of sumatriptan, was by itself a material piece of evidence. The Veteran's medical treatment record, noting a prescription of sumatriptan, was also a material piece of evidence when considered alongside previous cited evidence of record, such as the Veteran's 2017 VA migraine exam, the 2018 private migraine exam, the Veteran's migraine symptom logs, and the Veteran's 2020 BVA hearing testimony.

Lastly, the Board did not substantially comply with the Court's Joint Motion for Partial Remand (JMPR) terms. The Court explicitly mentioned the Veteran's prescribed migraine medications (sumatriptan) and cited *Jones v. Shinseki*, in its JMPR. Despite the

explicit remand terms, the Board neglected to consider or discuss the Veteran's migraine medication or the case law in *Jones v. Shinseki*, 26 Vet. App. 56, 63 (2012). Thus, the Board failed to substantially comply with the Court's remand terms and remand is appropriate.

STANDARD OF REVIEW

The Court reviews findings of fact by the Board under the clearly erroneous standard. Service connection determinations are issues of fact. *Futch v. Derwinski*, 2 Vet. App. 204, 206 (1992).

This Court also reviews claimed legal errors by the Board under the de novo standard, where the previous Board decision is not entitled deference. 38 U.S.C. § 7261(a)(1); see *Butts v. Brown*, 5 Vet. App. 532 (1993) (en banc). This Court also reviews de novo whether an applicable law or regulation was correctly applied. *Joyce v. Nicholson*, 19 Vet. App. 36, 42-46 (2005). The Court will set aside a conclusion of law made by the Board when that conclusion is determined to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Butts*, 5 Vet. App. at 538. The Court should determine whether the Board's decision is in accordance with the law.

ARGUMENT

I) The Board erred when it failed to consider all the relevant evidence of record and the Board erred when it failed to discuss potentially applicable provisions of law and regulation.

The Board is required to consider all relevant evidence of record and to consider, and discuss in its decision, all “potentially applicable” provisions of law and regulation. *Schafraath v. Derwinski*, 1 Vet. App. 589, 593 (1991); See 38 U.S.C. § 7104(a), (d)(1). According to VA regulations, relevant evidence is defined as any "information that tends to prove or disprove a matter at issue in a claim," as outlined in 38 C.F.R. 3.2501.

The Veteran's current appeal revolves around two key issues: (1) the severity of the Veteran’s migraines and (2) the frequency of the Veteran’s migraines. Addressing these matters is essential to ascertain whether the Veteran’s migraines meet the criteria of 38 C.F.R. §4.0124a Diagnostic code 8100.

As per 38 C.F.R. §4.0124a, a Veteran qualifies for a compensable rating for migraines if they experience "characteristic prostrating attacks averaging one in 2 months over the last several months." Notably, 38 CFR §4.0124a Diagnostic code 8100 does not contemplate the effects of medication. The Court in *Jones v. Shinseki* emphasized that the Board cannot deny a higher disability rating based on symptoms alleviated by medication when the diagnostic code does not account for medication effects. *Jones v. Shinseki*, 26 Vet. App. 56, 63 (2012). Consequently, the above-cited laws and regulations collectively

define relevant evidence as any information or evidence contributing to the proof or disproof of the (1) severity or (2) frequency of the Veteran's migraines.

The laws referenced in the preceding section unequivocally establish that as long as there is evidence in the record indicating that the Veteran's prescribed migraine medications affect either (1) the severity or (2) the frequency of his migraines, the Board is obligated to address this evidence alongside the precedent set in *Jones v. Shinseki*.

The Veteran's medical treatment records unambiguously indicate that the prescribed migraine medication (Sumatriptan) influences the (1) severity of his service-connected migraines. The medical records state, "The patient experiences migraines. These occur once per week...The pain is a 7/10 when they occur. Sound and light are aggravating. Sumatriptan provides some relief" (R-1521). Therefore, the Board was obligated to acknowledge and discuss these medical treatment records. The Board's failure to address the Veteran's medical treatment records is compounded by the explicit mention of these records in the Court of Appeals for Veterans Claims (CAVC) remand (R-468). Finally, because the medical treatment records establish that the migraine medication provides some ameliorative effects (R-1521), the Board was obliged to consider the "potentially applicable" provisions of law explicitly stated in *Jones v. Shinseki*, 26 Vet. App. 56, 63 (2012); *Schafrath v. Derwinski*, 1 Vet. App. 589, 593 (1991); refer to 38 U.S.C. § 7104(a), (d)(1).

II) The Board erred when it failed to address material evidence favorable to the appellant. The Veteran's medical treatment record, noting a prescription of sumatriptan, by itself is a material piece of evidence.

The Board is required to include in its decision a written statement detailing the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record. This statement must be sufficient to enable an appellant to understand the precise basis for the Board's decision (38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet. App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet. App. 49, 56-57 (1990)). To fulfill this requirement, the Board must assess the credibility and probative value of the evidence, consider the evidence it finds persuasive or unpersuasive, and provide reasons for rejecting any material evidence favorable to the veteran (See *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed.Cir.1996) (table); *Gabrielson v. Brown*, 7 Vet. App. 36, 39-40 (1994); *Gilbert*, *supra*).

VA regulations define material evidence as "existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim." 38 C.F.R. 3.156.

In this case, the unestablished fact required for the claim is the severity of the Veteran's migraines and whether they result in "characteristic prostrating attacks" 38 CFR §4.0124a Diagnostic code 8100. Therefore, so long as a medical treatment record speaks to the severity of the Veteran's migraines, it is a material piece of evidence. The Veteran's medical treatment records state, "The patient experiences migraines. These occur once

per week...The pain is a 7/10 when they occur. Sound and light are aggravating.

Sumatriptan provides some relief" (R-1521). This record speaks to the severity of the

Veteran's migraines and therefore it must be addressed by the Board and failure to do so

necessitates a remand.

III) The Board erred when it failed to address material evidence favorable to the appellant. The Veteran's medical treatment record, noting a prescription of sumatriptan, when considered with previous evidence of record is a material piece of evidence.

The Board is required to include in its decision a written statement detailing the reasons or bases for its findings and conclusions on all material issues of fact and law presented on the record. This statement must be sufficient to enable an appellant to understand the precise basis for the Board's decision (38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet. App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet. App. 49, 56-57 (1990)). To fulfill this requirement, the Board must assess the credibility and probative value of the evidence, consider the evidence it finds persuasive or unpersuasive, and provide reasons for rejecting any material evidence favorable to the veteran See *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed.Cir.1996); *Gabrielson v. Brown*, 7 Vet. App. 36, 39-40 (1994); *Gilbert*, *supra*).

VA regulations define material evidence as "existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim" (38 CFR 3.156).

In this instance, the unestablished fact required for the claim is the severity of the Veteran's migraines and whether they result in "characteristic prostrating attacks" 38 CFR §4.0124a Diagnostic code 8100. Therefore, any medical treatment record that, when

considered with the previous evidence of record, speaks to the severity of a Veteran's migraine condition is a material piece of evidence.

The Veteran's April 2020 sumatriptan prescription is a material piece of evidence (R-1656). When one considers this April 2020 sumatriptan prescription, in conjunction with previous evidence of record (2017 VA exam, the 2018 private migraine DBQ, 2019 headache symptom logs, the 2020 BVA hearing testimony), it seems to substantiate an unestablished fact: either the Veteran's migraines had intensified since the 2017 VA exam, or his migraines were severe and uncontrolled throughout the appeal period.

The 2017 VA exam shows non-prostrating migraines (R-4072). The 2018 private exam shows prostrating migraines (R-3674). The 2019 headache symptom logs show prostrating migraines (R-2446). The February 2020 BVA hearing transcript describes prostrating migraines (R-1885). The Veteran was prescribed sumatriptan in April 2020 (R-1656) possibly showing prostrating migraines. Given the above, the Veteran's April 2020 migraine prescription either supports the Veteran's migraines were prostrating the entire appeal period or at the very least had increased in severity since the 2017 VA exam. This is evident, because why would the Veterans treating physician prescribe him sumatriptan if his migraines were under control and had not increased in severity? Thus, this medical treatment record is a material piece of and because it was omitted from the Board's analysis, the Board's whole conclusion is potentially erroneous. Therefore, a remand is appropriate.

IV) The Board failed to provide an adequate statement of the reasons or bases for its findings and conclusions on all material issues of fact and law. The Board's statement of reasons and bases was insufficient, making it impossible for the appellant to understand the precise basis for the Board's decision.

The Court, in its prior decisions, has established that the Board, when adjudicating a claim, must not only consider relevant evidence but also all potentially relevant evidence, as exemplified in *Gabrielson v. Brown*, 7 Vet. App. 36, 40 (1994). Furthermore, it is incumbent upon the Board to incorporate into its decision a comprehensive written statement of the reasons or bases for its findings and conclusions on all material issues of fact and law. This statement must be sufficient to enable an appellant to understand the precise basis for the Board's decision (38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet. App. 517, 527 (1995); *Gilbert v. Derwinski*, 1 Vet. App. 49, 56-57 (1990)).

The appellant in the present case encounters a predicament when attempting to read or interpret the Board's July 2023 decision (R-5). How is the appellant supposed to determine whether or not the Board impermissibly considered the ameliorative effects of his migraine medication when the Board completely neglected to mention or discuss his prescribed sumatriptan in its decision?

Likewise, the appellant is left in the dark regarding whether the Board considered the relevant and applicable provisions of law, specifically *Jones v. Shinseki*, as the Board did not cite this precedential case in its decision.

Adding to the appellant's confusion is the Board's failure to acknowledge *Jones v. Shinseki*, despite the Court of Appeals for Veterans Claims (CAVC) explicitly referencing it in the Joint Motion for Partial Remand (R-467).

In conclusion, the Board was obligated to address both the Veteran's prescribed migraine medication and the precedent set in *Jones v. Shinseki*. By neglecting to do so, the Board failed to provide an adequate statement of the reasons and bases for its findings and conclusions, making it impossible for the appellant to understand the precise bases for the Board's decision. Consequently, a remand is warranted.

V) The Board failed to substantially comply with the Court of Appeals for Veterans Claims remand terms.

A remand by the Court confers on the claimant a legal right to substantial compliance with the remand order and the Board errs when it fails to ensure compliance with the terms of such remand. *Donnellan v. Shinseki*, 24 Vet. App. 167, 176 (2010); *Stegall v. West*, 11 Vet. App. 268, 271 (1998).

The CAVC Joint Motion for Partial Remand stated the following:

The parties agree that the Board failed to provide adequate reasons or bases in adjudicating Appellant's headache disability because it is unclear whether the Board impermissibly considered the ameliorative effects of medication. The Court has held that in assigning a disability rating, the Board may not consider the ameliorative effects of medication where such effects are not explicitly contemplated by the applicable rating criteria. *Jones v. Shinseki*, 26 Vet. App. 56, 63 (2012).

In this case, the Board noted that Appellant takes various medication for his headaches, including sumatriptan, ibuprofen, and medical marijuana. [Record (R.) at 12-13]. The Board noted that Appellant reported that this medication "provides some relief," thus making it unclear if the Board considered these ameliorative effects in determining the severity of his headaches. [R. at 13]. Diagnostic Code 8100, which pertains to headaches, does not contemplate the use of medication. *See* 38 C.F.R. § 4.97. As the Board noted medication and found that the medication provided some relief without more explanation, it is unclear whether the Board impermissibly accounted for the ameliorative effects of medication in determining the severity of his headache symptoms. Accordingly, remand is warranted for the Board to provide adequate reasons or bases, as the applicable diagnostic code does not contemplate the use of medication. (R-467).

The Court of Appeals for Veterans Claims (CAVC) remanded the issue of entitlement to a compensable rating for migraines due to the potential impermissible consideration of the ameliorative effects of the veteran's medication. The Court in its joint motion for partial remand specifically referenced

(1) the Veteran's migraine medications (i.e., sumatriptan, ibuprofen, and medical marijuana), (2) the Veteran's medical records which note the ameliorative effects of his sumatriptan (3) the precedential case law in *Jones v. Shinseki*, 26 Vet. App. 56, 63 (2012).

Despite the Court's explicit remand terms, the Board in its decision dated July 25, 2023 (R-5 to R-13) (1) did not discuss or mention any of the Veteran's migraine medications, (2) it did not discuss how the Veteran's prescribed sumatriptan provides some ameliorative effects and (3) it did not discuss or mention the explicitly referenced precedential case law *Jones v. Shinseki*, 26 Vet. App. 56, 63 (2012). Given these omissions, the Board has hindered judicial review and failed to substantially comply with the remand terms, making a remand appropriate.

CONCLUSION

For the above-referenced reasons, the Court should vacate the Board's Decision dated July 25, 2023, and remand this matter for further adjudication.

Respectfully Submitted,
FOR THE APPELLANT
VA Disability Group PLLC
/s/ Spencer Jolicoeur
Spencer Jolicoeur, Attorney
7837 S Sprinkle Rd
Portage, MI 49002
Phone: (844) 838-5297
Email: spencer@vadisabilitygroup.com