BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF
LEONARD BERAUD

[redacted]

DOCKET NO. 05-28 830A) DATE 15 Dec 10
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On appeal from the
Department of Veterans Affairs Regional Office in Muskogee, Oklahoma

THE ISSUES

1. Entitlement to an effective date prior to August 27, 2004 for the grant of service connection for migraine headaches due to head trauma over right eye to include whether there was clear and unmistakable error (CUE) in the November 1985 rating decision.

2. Entitlement to a total disability rating based upon individual unemployability due to service-connected disabilities (TDIU).

REPRESENTATION

Appellant represented by: Military Order of the Purple Heart of the U.S.A.

WITNESSES AT HEARING ON APPEAL

Appellant and S.B.

IN THE APPEAL OF
LEONARD BERAUD

[redacted]

ATTORNEY FOR THE BOARD

J.M. Seay, Associate Counsel

INTRODUCTION

The Veteran had active service from July 1974 to July 1977.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from rating decisions of the Department of Veterans Affairs (VA) Regional Office (RO) in Muskogee, Oklahoma.

A hearing was held on September 13, 2010, by means of video conferencing equipment with the appellant in Muskogee, Oklahoma, before Kathleen K. Gallagher, a Veterans Law Judge (VLJ), sitting in Washington, DC, who was designated by the Chairman to conduct the hearing pursuant to 38 U.S.C.A. § 7107(c), (e)(2) and who is rendering the determination in this case. A transcript of the hearing testimony is in the claims file.

The Board remanded the Veteran's case in June 2010 to provide the Veteran a hearing before the Board. As noted above, the Veteran was afforded a video conference hearing before the undersigned in September 2010. Therefore, the Board finds that the remand directives have been completed, and, thus, a new remand is not required to comply with the holding of *Stegall v. West*, 11 Vet. App. 268 (1998).

With respect to the procedural history of this case, the Board notes that the issue of entitlement to an earlier effective date for the grant of service connection for migraine headaches stems from a December 2004 rating decision, in which the RO continued a noncompensable disability rating for service-connected scars and granted service connection for headaches, assigning a 50 percent disability rating, effective August 27, 2004. In January 2005, the Veteran submitted a notice of

disagreement with respect to the assigned disability ratings and with the effective date assigned for the grant of service connection for migraine headaches. The RO issued a statement of the case in August 2005 and the Veteran filed a VA Form 9 in August 2005 in which he indicated that he wished to perfect his appeal only as to the issues of entitlement to a compensable disability rating for scars and entitlement to an earlier effective date for the grant of service connection for migraine headaches. Meanwhile, the Veteran filed a TDIU claim in September 2005, which the RO denied in a September 2005 rating decision. The Veteran filed a notice of disagreement in October 2005 and the RO issued a statement of the case in April 2006. The Veteran filed a VA Form 9 in April 2006. After the Veteran submitted timely substantive appeals as to the three issues discussed above, he submitted a letter stating that he wished to dismiss all issues on appeal to the Board as addressed in the June 2008 letter from the Board. The June 2008 letter provided notification regarding the issue of entitlement to a compensable disability rating for service-connected scars. However, it appears that the RO interpreted the Veteran's submission as a dismissal of all three issues on appeal. The RO clarified the Veteran's intentions and resumed the appellate process for the earlier effective date and the issue of entitlement to TDIU, providing a supplemental statement of the case in February 2010. Therefore, the issues are appropriately in appellate status.

Finally, the Board recognizes that the Veteran did not file a substantive appeal with respect to the issue of entitlement as to whether there was CUE in the November 1985 rating decision. The record shows that the RO issued a rating decision in February 2010 and the Veteran submitted a timely notice of disagreement. The RO then issued a statement of the case in March 2010 with respect to the issue. Although the Veteran did not submit a VA Form 9, in the informal hearing presentation dated in May 2010, the Veteran's representative included the argument of CUE when addressing whether the Veteran was entitled to an earlier effective date. In addition, during the September 2010 hearing, the Veteran and his representative contended that the November 1985 rating decision was the product of CUE and, therefore, the Veteran was entitled to an earlier effective date. Due to the intertwined nature of the issues of CUE and entitlement to an earlier effective date and the actions of the Veteran and his representative, the Board finds that the issue of whether clear and unmistakable error (CUE) existed in the November 1985 rating

decision is on appeal. *Cf. Percy v. Shinseki*, 23 Vet. App. 37, 46 (2009) (holding that, where the issue was treated by VA as if it were timely perfected for more than five years before the untimeliness was raised by the Board in the first instance, any issue concerning the timely filing of the substantive appeal was waived by VA).

In addition, the Board acknowledges that the May 2010 rating decision denied service connection for hearing loss and tinnitus. The Veteran submitted a timely notice of disagreement and the July 2010 statement of the case denied the issues of service connection for hearing loss and tinnitus. However, the Veteran did not submit a substantive appeal and, therefore, the issues are not before the Board. Furthermore, the May 2009 rating decision denied entitlement to a disability rating in excess of 50 percent for service-connected migraine headaches. The Veteran submitted a timely notice of disagreement and the RO issued a statement of the case in January 2010. However, the Veteran did not appeal the decision and, therefore, the issue is not before the Board.

The issue of entitlement to a TDIU is addressed in the REMAND portion of the decision below and is REMANDED to the RO via the Appeals Management Center (AMC), in Washington, DC.

FINDINGS OF FACT

1. The November 1985 rating decision that denied service connection for headaches is final.

2. The November 1985 rating decision was supported by evidence then of record, and it is not shown that the RO ignored or incorrectly applied the applicable statutory and regulatory provisions existing at the time.

3. The Veteran's most recent statement to reopen his claim for service connection for headaches was received on August 27, 2004.

CONCLUSIONS OF LAW

1. The November 1985 rating decision that denied service connection for headaches is final. 38 U.S.C.A. § 7105 (West 2002); 38 U.S.C.A. §§ 20.302, 20.1103 (2010).

2. The November 1985 rating decision, in which the RO denied service connection for headaches, was not clearly and unmistakably erroneous. 38 U.S.C.A. §§ 5109A, 5110 (West 2002); 38 C.F.R. §§ 3.104, 3.105, 3.400 (2010).

3. The criteria for an effective date prior to August 27, 2004, for the grant of service connection for migraine headaches have not been met. 38 U.S.C.A. § 5110 (West 2002); 38 C.F.R. §§ 3.151, 3.155, 3.156, 3.400 (2010).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

VA's Duties to Notify and Assist

Upon receipt of a substantially complete application for benefits, VA must notify the claimant what information or evidence is needed in order to substantiate the claim and it must assist the claimant by making reasonable efforts to get the evidence needed. 38 U.S.C.A. §§ 5103(a), 5103A; 38 C.F.R. § 3.159(b); *see Quartuccio v. Principi*, 16 Vet. App. 183, 187 (2002). The notice required must be provided to the claimant before the initial unfavorable decision on a claim for VA benefits, and it must (1) inform the claimant about the information and evidence not of record that is necessary to substantiate the claim; (2) inform the claimant about the information and evidence that VA will seek to provide; and (3) inform the claimant about the information and evidence the claimant is expected to provide. 38 U.S.C.A. §§ 5103(a); 38 C.F.R. § 3.159(b)(1); *Pelegrini v. Principi*, 18 Vet. App. 112, 120 (2004).

In *Dingess v. Nicholson*, 19 Vet. App. 473 (2006), the Unites States Court of Appeals for Veterans Claims held that, upon receipt of an application for a service

connection claim, 38 U.S.C. § 5103(a) and 38 C.F.R. § 3.159(b) require VA to review the information and the evidence presented with the claim and to provide the claimant with notice of what information and evidence not previously provided, if any, will assist in substantiating, or is necessary to substantiate, each of the five elements of the claim, including notice of what is required to establish service connection and that a disability rating and an effective date for the award of benefits will be assigned if service connection is awarded.

Nevertheless, in this case, the Veteran is challenging the effective date assigned following the grant of service connection for migraine headaches. In this regard, once service connection is granted and an initial disability rating and effective date have been assigned, the claim is substantiated, and additional 5103(a) notice is not required. *See Dingess v. Nicholson*, 19 Vet. App. 473, 490- 491 (2006); *Hartman v. Nicholson*, 483 F.3d 1311 (Fed. Cir. 2007); *Dunlap v. Nicholson*, 21 Vet. App. 112 (2007). The Board notes that the Veteran was not provided notification regarding his claim for service connection for migraine headaches prior to the December 2004 rating decision. However, the Veteran was provided a notification letter in May 2007. The Veteran's claim was readjudicated by the February 2010 supplemental statement of the case. Therefore, any defect in the timing of the notice of this information was harmless. *Prickett v. Nicholson*, 20 Vet. App. 370, 377-78 (2006) (VA cured failure to afford statutory notice to claimant prior to initial rating decision by issuing notification letter after decision and readjudicating claim and notifying claimant of such readjudication in the statement of the case).

The Court has also determined that VCAA has no applicability to cases involving CUE. *See Livesay v. Principi*, 15 Vet. App. 165 (2001). Therefore, the notice and development provisions of the VCAA do not apply to the CUE portion of the claim for an earlier effective date.

In addition, the duty to assist the Veteran has also been satisfied in this case. The Veteran's service treatment records as well as all available VA medical records, private treatment records, and Social Security Administration (SSA) records are in the claims file and were reviewed by both the RO and the Board in connection with the Veteran's claim for an earlier effective date. As this is a claim for an earlier

effective date and consideration is based on the evidence of record at the time of the grant of service connection, there was no duty to obtain a VA examination in connection with this claim. VA has further assisted the Veteran and his representative throughout the course of this appeal by providing them a SOC and SSOC, which informed them of the laws and regulations relevant to the claim. For these reasons, the Board concludes that VA has fulfilled the duty to assist the Veteran in this case.

LAW AND ANALYSIS

Under VA laws and regulations, a specific claim in the form prescribed by VA must be filed in order for benefits to be paid or furnished to any individual under laws administered by the VA. 38 U.S.C.A. § 5101(a); 38 C.F.R. § 3.151(a). In general, the effective date of an award based on an original claim or a claim reopened after final adjudication of compensation shall be fixed in accordance with the facts found, but shall not be earlier than the date of the receipt of the application. 38 U.S.C.A. § 5110(a); 38 C.F.R. § 3.400. Generally, the effective date of an award of disability compensation based on an original claim shall be the date of receipt of the claim or the date entitlement arose, whichever is later. 38 U.S.C.A. § 5110(a); 38 C.F.R. § 3.400. However, if the claim is received within one year after separation from service, the effective date of an award of disability compensation shall be the day following separation from active service. 38 U.S.C.A. § 5110(b)(1); 38 C.F.R. § 3.400(b)(2)(i). The effective date of an award of disability compensation based on a claim to reopen after a final disallowance shall be the date of receipt of the new claim or the date entitlement arose, whichever is later. 38 U.S.C.A. § 5110(a); 38 C.F.R. § 3.400(q)(ii), (r).

'Claim' is defined broadly to include a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement to a benefit. 38 C.F.R. § 3.1(p); *Brannon v. West*, 12 Vet. App. 32, 34-5 (1998); *Servello v. Derwinski*, 3 Vet. App. 196, 199 (1992). Any communication or action, indicating an intent to apply for one or more benefits under laws administered by the VA from a claimant may be considered an informal claim. Such an informal claim must identify the benefits sought. Upon receipt of an

informal claim, if a formal claim has not been filed, an application form will be forwarded to the claimant for execution. 38 C.F.R. § 3.155(a). To determine when a claim was received, the Board must review all communications in the claims file that may be construed as an application or claim. *See Quarles v. Derwinski*, 3 Vet. App. 129, 134 (1992).

At any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim. Such records include, but are not limited to service records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the Veteran by name; additional service records forwarded by the Department of Defense or the service department to VA any time after VA's original request for service records; and declassified records that could not have been obtained because the records were classified when VA decided the claim. Such records do not include those records that VA could not have obtained when it decided the claim because the records did not exist when VA decided the claim, or because the claimant failed to provide sufficient information for VA to identify and obtain the records from the respective service department, the JSSRC, or from any other official source. 38 C.F.R. § 3.157(c) (2010).

An award made based all or in part on the 'relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later.' 38 C.F.R. § 3.156(c)(3) (2010).

The revision of a final rating decision based on CUE generally will involve the assignment of an earlier effective date for those benefits involved because the governing regulation requires that benefits be paid 'as if the corrected decision had been made on the date of the reversed decision.' 38 C.F.R. § 3.105(a). CUE is special type of error; it is an error that the claimant alleges was made in a prior rating decision that the claimant did not appeal within the one-year time limit for filing an appeal to the Board. 38 U.S.C.A. §§ 5109A, 7105(b)(1), (c); 38 C.F.R. § 3.105(a). It is not just any error but rather it is the sort of error that, had it not

been made, would have manifestly changed the outcome of the rating decision so that the benefit sought would have been granted. *Russell v. Principi*, 3 Vet. App. 310, 313 (1992); *cf. Fugo v. Brown*, 6 Vet. App. 40, 44 (1993) (noting that '[i]t is difficult to see how either failure in 'duty to assist' or failure to give reasons or bases could ever be CUE'); *see Caffrey v. Brown*, 6 Vet. App. 377, 383-84 (holding that failure to fulfill duty to assist cannot constitute clear and unmistakable error). It is not simply a disagreement with how the facts were weighed or evaluated. Rather, either the correct facts, as they were known at the time, were not before the adjudicator or the statutory or regulatory provisions extant at the time were incorrectly applied. *Russell*, 3 Vet. App at 313.

A claim for benefits based on CUE in a prior final rating decision entails special pleading and proof requirements to overcome the finality of the decision by collateral attack because the decision was not appealed during the appeal period. *Fugo*, 6 Vet. App. at 44; *Duran v. Brown*, 7 Vet. App. 216, 223 (1994). In order for a claimant to successfully establish a valid claim of CUE in a final RO rating decision, the claimant must articulate with some degree of specificity what the alleged error is, and, unless the alleged error is the kind of error that, if true, would be CUE on its face, the claimant must provide persuasive reasons explaining why the result of the final rating decision would have been manifestly different but for the alleged error. *Luallen v. Brown*, 8 Vet. App. 92, 94 (1995); *Fugo*, 6 Vet. App. at 44, review en banc denied, 6 Vet. App. 162, 163 (1994) (noting that pleading and proof are two sides of the same coin; if there is a heightened proof requirement, there is, a fortiori, a heightened pleading requirement).

After considering the evidence of record under the laws and regulations as set forth above, the Board finds that August 27, 2004 is the correct date for the grant of service connection for migraine headaches. Although the Veteran has alleged that he is entitled to an earlier effective date for his award of service connection, there is no basis under the governing legal criteria to establish that he is legally entitled to an earlier effective date.

In this case, the Veteran has claimed that the original November 1985 rating decision, wherein the Veteran's claim for service connection for headaches was

denied, is the product of CUE. Specifically, the Veteran stated that the RO did not have the complete service treatment records before them and incorrectly determined that his headaches were not chronic during his period of active service. In addition, the Veteran's representative asserted that the Veteran should have been afforded a VA examination in connection with his claim for service connection.

The record reveals that the Veteran submitted a claim for service connection for headaches in March 1985. The RO obtained the Veteran's service treatment records, as evidenced by the November 5, 1985 time stamp. The records showed that the Veteran was treated for trauma to his head in November 1975 and complained of headaches. However, the subsequent service treatment records did not show evidence of a chronic condition. The January 1976 service treatment record noted that the Veteran complained of headaches, watery eyes, running nose, and chest congestion, but that the Veteran was suffering from a cold. In addition, the Veteran's reenlistment examination conducted in 1985 shows that the Veteran related his current headaches to a motor vehicle accident that occurred in 1981, following the Veteran's period of active service. The outpatient VA treatment records were also requested in conjunction with the appeal and indicated treatment for headaches. In the November 1985 rating decision, the RO denied the Veteran's claim for service connection for headaches. In the decision, the RO explained that the service treatment records were negative for chronic headaches. The RO acknowledged that the November 1975 service treatment record recorded a complaint of headaches following the Veteran's in-service head injury. However, the RO noted that the reenlistment examination dated in 1985 showed a report of recurrent headaches since 1981 after a motor vehicle accident. In addition, it was noted that the outpatient treatment reports indicated complaints of headaches. The Veteran was notified of the decision and his appellate and procedural rights, but did not appeal the decision. Therefore, the November 1985 rating decision is final. 38 C.F.R. § 20.1103.

Because CUE involves presenting an allegation of an error with "some degree of specificity," a Veteran's assertion of a particular CUE does not encompass all potential allegations of CUE in the decision. Indeed, there is no "judicially created issue-exhaustion requirement." Instead, a Board decision reaches only the specific

assertions of CUE that are raised. *See Andre v. Principi*, 301 F.3d 1354 (Fed. Cir. 2002); *See Andrews v. Nicholson*, 421, F.3d 1278 (Fed. Cir. 2005).

As noted above, the Veteran and his representative have contended that the RO did not consider or have the complete service treatment records at the time of the November 1985 rating decision. However, the record shows that the Veteran's service treatment records were associated with the claims file at the time of the November 1985 rating decision. Indeed, the service treatment records are time stamped with the date of November 5, 1985, prior to the date of the issued rating decision. In addition, the Veteran has asserted that the RO failed to note his complaint of headaches during service. However, as noted above, the rating decision specifically noted that the Veteran complained of headaches following his head injury. However, the RO determined that there was no chronicity of the condition during active service and specifically noted the 1985 examination report wherein the Veteran stated that his current headaches existed since 1981, after his period of active service. The RO denied the Veteran's claim for service connection by finding that the headaches were not chronic since the period of active service. In this case, the Veteran and his representative are essentially arguing that the RO misconstrued the facts by determining that the Veteran's condition was not chronic during service. In essence, the Veteran's contentions boil down to a disagreement with how the facts were weighed and evaluated. However, CUE is an error of fact or law that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. *Fugo v. Brown*, 6 Vet. App. 40, 43 (1993). When attempting to raise a claim of CUE, a claimant must describe the alleged error with some degree of specificity and, unless it is the kind of error, that if true, would be CUE on its face, must provide persuasive reasons as to why the result would have been manifestly different but for the alleged error. *Id.* at 43-44. Neither a claim alleging improper weighing and evaluating of the evidence in a previous adjudication, nor general, non-specific claims (including sweeping allegations of failures to follow the regulations or to provide due process) meet the restrictive definition of CUE. *Id.* at 44. Importantly, "clear and unmistakable error is an administrative failure to apply the correct statutory and regulatory provision to the correct and relevant facts; it is not mere misinterpretation of facts." *Oppenheimer v.*

Derwinski, 1 Vet. App. 370, 372 (1991). Therefore, the RO's determination in the November 1985 rating decision that the headaches were not chronic since service does not rise to the level of CUE.

The Board also rejects the argument that if a VA examination would have been given before the November 1985 denial, the claim would have been granted. The Board notes that allegations that VA failed in its duty to assist are, as a matter of law, insufficient to form a basis for a claim of clear and unmistakable error. *Caffrey v. Brown*, 6 Vet. App. 377, 382 (1994).

Based on the foregoing, the Board finds that the November 1985 rating decision was supported by evidence then of record and was consistent with the law and regulations then in effect. Therefore, the Board concludes that the November 1985 RO decision was not clearly and unmistakably erroneous and cannot be revised or reversed based on CUE. 38 U.S.C.A. § 5109A; 38 C.F.R. § 3.105(a). Having found that there is no CUE in the November 1985 rating decision, the Board will now consider whether the Veteran is entitled to an earlier effective date based on the date of his claim.

As noted above, the Veteran was denied service connection for headaches in the November 1985 rating decision. The Veteran did not appeal the rating decision and, therefore, the decision is final. 38 C.F.R. § 20.1103. Following the decision, the first record of correspondence with respect to headaches was dated in December 1989 wherein the Veteran requested that his claim for service connection for headaches be reopened. The March 1990 rating decision denied service connection for headaches as they were not considered to be related to military service. The Veteran was notified of the decision and his appellate and procedural rights, but did not appeal the decision. Therefore, the decision is final. *Id.* Thereafter, the Veteran requested service connection for headaches in February 1992. The May 1992 rating decision denied the Veteran's claim to reopen as the evidence received was new, but was not considered material. The Veteran was notified of the decision and his appellate and procedural rights, but did not appeal the decision. Therefore, the decision is final. *Id.* Following the May 1992 rating decision, the next correspondence related to headaches is dated in January 2001 wherein the Veteran

requested that his claim for service connection be reopened. The March 2002 rating decision denied the Veteran's claim to reopen as there was no medical evidence relating the Veteran's headaches to active service. The Veteran was notified of the decision and his appellate and procedural rights, but did not appeal the decision. Therefore, the decision is final. *Id.* The next correspondence from the Veteran was dated in August 27, 2004, and was considered by the RO to be an informal claim to reopen his claim of service connection for headaches. The evidence received included a VA examination report linking the Veteran's current headaches to active service and VA treatment records. The December 2004 rating decision granted service connection for migraine headaches due to head trauma over right eye and granted a 50 percent disability rating, effective August 27, 2004. As noted above, the law provides that when a claim is reopened with new and material evidence after a final disallowance, the effective date of service connection will be the date of VA receipt of the claim to reopen, or the date entitlement arose, whichever is later. 38 U.S.C.A. § 5110(a), (b)(1); 38 C.F.R. § 3.400(q), (r). The Board notes that the Veteran failed to appeal the prior adverse rating decisions in November 1985, May 1992, and March 2002. Therefore, the date of his most recent and ultimately successful claim is August 27, 2004, when he submitted an informal petition to reopen his claim for service connection. The Board has considered whether earlier correspondence can be construed as a claim for the benefit sought. However, a review of the record reveals no communication or action of record indicating an intent to apply for service connection for headaches after the March 2002 rating decision but prior to August 27, 2004. 38 C.F.R. § 3.155 (2010).

With regard to the date entitlement arose, the Board notes that service connection may be granted for disability or injury incurred in or aggravated by active military service. 38 U.S.C.A. §§ 1110 (West 2002); 38 C.F.R. § 3.303(a) (2010). In order to establish direct service connection for a disorder, there must be (1) competent evidence of the current existence of the disability for which service connection is being claimed; (2) competent evidence of a disease contracted, an injury suffered, or an event witnessed or experienced in active service; and (3) competent evidence of a nexus or connection between the disease, injury, or event in service and the current disability. *Davidson v. Shinseki*, 581 F.3d 1313 (Fed. Cir. Sept. 14, 2009); *cf. Gutierrez v. Principi*, 19 Vet. App. 1, 5 (2004) (citing *Hickson v. West*, 12 Vet.

App. 247, 253 (1999)). The Board acknowledges the Veteran's argument that his entitlement to service connection for headaches arose years prior to his assigned effective date of August 27, 2004. However, as noted above, VA regulations provide that the effective date of service connection will be the date of VA receipt of the claim to reopen, or the date entitlement arose, whichever is later. 38 U.S.C.A. § 5110(a); 38 C.F.R. § 3.400(q)(ii), (r). Although entitlement to service connection for headaches arguably arose prior to the date of the claim, August 27, 2004, the date of the claim is later and is therefore the effective date for the award of service connection for migraine headaches.

Finally, during the September 2010 hearing, the Veteran's representative noted that a claim reopened based on previously missing service treatment records is an exception to the general rule that an effective date can be no earlier than the date a claim to reopen was submitted. To this extent, the Veteran appears to be relying on 38 C.F.R. § 3.156(c)(1) which states that 'notwithstanding any other section in this part, at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim, notwithstanding paragraph (a) of this section.' The regulations also state that an award made based all or in part on the records identified by paragraph (c)(1) is effective on the date the entitlement arose or the date VA received the previously decided claim, whichever is later. 38 C.F.R. § 3.156(c)(3). However, in this case, the Veteran's service treatment records were associated with the claims file at the time of the original claim for service connection. The November 1985 rating decision noted review of the service treatment records and the service treatment records were time stamped when they were received by the RO on November 5, 1985. There is no indication that the service treatment records were not available at the time the Veteran's original service connection claim was denied in November 1985, nor is there any indication that additional service treatment records have been associated with the claims file since that time. Therefore, 38 C.F.R. § 3.156(c) does not provide a basis for an earlier effective date. The Board acknowledges that the Veteran's personnel file was received by the RO in March 2010. However, the records were associated with

the file following the grant of service connection for headaches and, therefore, 38 C.F.R. § 3.156(c) is not for application.

Based upon the evidence of record, the Board finds that the preponderance of the evidence is against entitlement to an earlier effective date for the grant of entitlement to service connection for migraine headaches prior to August 27, 2004. Thus, the benefit of the doubt doctrine is not applicable and the claim is denied. *See* 38 U.S.C.A. § 5107(b); *Ortiz v. Principi*, 274 F.3d 1361 (Fed. Cir. 2001); *Gilbert v. Derwinski*, 1 Vet. App. 49, 55-57 (1991).

ORDER

Entitlement to an effective date prior to August 27, 2004 for the grant of service connection for migraine headaches is denied.

REMAND

Reasons for Remand: To obtain a new medical examination.

The law provides that VA shall make reasonable efforts to notify a claimant of the evidence necessary to substantiate a claim and requires the VA to assist a claimant in obtaining that evidence. 38 U.S.C.A. §§ 5103, 5103A (West 2002); 38 C.F.R. § 3.159 (2010). Such assistance includes providing the claimant a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on a claim. 38 U.S.C.A. §§ 5103, 5103A (West 2002); 38 C.F.R. § 3.159 (2010).

The Veteran contends that his service-connected disabilities preclude his gainful employment. The record shows that the Veteran is service-connected for migraine headaches, rated as 50 percent disabling, service-connected for mood disorder, rated as 30 percent disabling, and service-connected for scar above the right eye, rated as 0 percent disabling. The combined rating is 70 percent. 38 C.F.R. § 4.25.

In this case, the Veteran was afforded a VA examination in June 2007 in connection with his claim for TDIU. In the examination report, it was noted that the Veteran was service-connected for headaches and mood disorder. The Veteran reported to the examiner that he had not worked since 2001 and that he was disabled in his lower back. The examiner briefly noted the Veteran's complaint of headaches and discussed the Veteran's mood disorder. In an addendum to the report, the examiner noted that the Veteran's headaches and mental disorder would not affect his ability to work. The rationale provided for the opinion was that the Veteran stated that he hadn't worked since 2001 and was disabled because of lower back problems. However, the Veteran has asserted that the June 2007 VA examination was inadequate. The Veteran explained that he did not solely relate his unemployment to his back problems and that he did have problems at work due to his headaches.

Following the June 2007 examination report, there is conflicting evidence as to whether the Veteran's service-connected disabilities render the Veteran unable to secure or follow a substantially gainful occupation. In this respect, the August 2009 VA examination report noted that the Veteran's headaches had no significant effects on usual occupation. However, the February 2009 VA examination report determined that the Veteran's headaches had a moderate to severe functional/occupational effect. In addition, the November 2008 QTC examination report noted that the Veteran had headaches once a day and that he had to take off many days at work due to his headaches. It was noted that the Veteran's daily activities were affected by the headaches. In addition, the April 2008 QTC examination report evaluated the Veteran's mood disorder and determined that the Veteran was unemployed because he could not get along with people.

If the VA undertakes the effort to provide the Veteran with a medical examination, it must ensure that such examination is an adequate one. *See Barr v. Nicholson*, 21 Vet. App. 303, 311 (2007). The addendum to the June 2007 VA examination report noted that the Veteran's service-connected disabilities did not affect his ability to work as he was disabled due to his back. However, the other evidence of record, suggests that the Veteran missed work due to his headaches. In addition, the evidence is unclear as to whether the Veteran's service-connected disabilities have

an impact on his employability. Thus, the Board finds that a medical opinion is necessary for the purpose of determining the *combined* effect of the Veteran's service-connected disabilities on his employability, and whether the Veteran is unable to secure or follow a substantially gainful occupation as a result of his service-connected disabilities. *See Kowalski v. Nicholson*, 19 Vet. App. 171 (2005) (stating that VA has discretion to schedule a Veteran for a medical examination where it deems an examination necessary to make a determination on the Veteran's claim); *Shoffner v. Principi*, 16 Vet. App. 208, 213 (2002) (holding that VA has discretion to decide when additional development is necessary).

Accordingly, the case is REMANDED for the following action:

> 1. The Veteran should be afforded an appropriate VA examination to determine the combined or total effect of his service-connected disabilities on his employability. Any and all studies, tests, and evaluations deemed necessary by the examiner should be performed. The examiner is requested to review all pertinent records associated with the claims file. It should be noted that the Veteran is currently service-connected for migraine headaches, mood disorder, and scar above the right eyebrow. The examiner should comment on the *combined* effect of the Veteran's service-connected disabilities on his ability to engage in any type of full time employment, including any form of sedentary work, and whether, in the examiner's opinion, the service connected disabilities are of such severity to result in unemployability.
>
> It should be noted that consideration may be given to the Veteran's level of education, special training, and previous work experience, but not to his age or the impairment caused by nonservice-connected disabilities.

> A clear rationale for all opinions would be helpful and a discussion of the facts and medical principles involved would be of considerable assistance to the Board. Since it is important "that each disability be viewed in relation to its history [,]" 38 C.F.R. § 4.1 (2010), copies of all pertinent records in the appellant's claims file, or in the alternative, the claims file, must be made available to the examiner for review.
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> 2. When the development requested has been completed, the case should be reviewed by the RO on the basis of additional evidence. If the benefit sought is not granted, the Veteran and his representative should be furnished a Supplemental Statement of the Case and be afforded a reasonable opportunity to respond before the record is returned to the Board for further review.

The appellant has the right to submit additional evidence and argument on the matter or matters the Board has remanded. *Kutscherousky v. West*, 12 Vet. App. 369 (1999).

This claim must be afforded expeditious treatment. The law requires that all claims that are remanded by the Board of Veterans' Appeals or by the United States Court of Appeals for Veterans Claims for additional development or other appropriate action must be handled in an expeditious manner. *See* 38 U.S.C.A. §§ 5109B, 7112 (West Supp. 2009).

KATHLEEN K. GALLAGHER
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 then 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.*

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. 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 VA, then you can get information on how to do so by writing directly to the Court. Upon request, the Court will provide you with a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to represent appellants. This information, as well as information about free representation through the Veterans Consortium Pro Bono Program (toll free telephone at: (888) 838-7727), is also provided on the Court's website at: http://www.uscourts.cavc.gov.

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 the 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 the General Counsel. *See* 38 C.F.R. 14.636(i); 14.637(d).