

APPENDIX A

Note: This disposition is nonprecedential.

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

BETZAIDA P. JERNIGAN,

Claimant-Appellant

v.

ROBERT L. WILKIE, SECRETARY OF

VETERANS AFFAIRS,

Respondent-Appellee

2019-2235

Appeal from the United States Court of
Appeals for Veterans Claims in No. 18-2918,
Judge Amanda L. Meredith.

A1

Decided: April 10, 2020

BETZAIDA P. JERNIGAN, Lake Helen,
FL, pro se.

ROBERT C. BIGLER, Commercial
Litigation Branch, Civil Division, United
States Department of Justice, Washington,
DC, for respondent-appellee. Also represented
by JOSEPH H. HUNT, ALLISON KIDD-
MILLER, ROBERT EDWARD KIRSCHMAN,
JR.; Y. KEN LEE, JULIE HONAN, Office of
General Counsel, United States Department of
Veterans Affairs, Washington, DC.

Before PROST, *Chief Judge*,
O'MALLEY and TARANTO,
Circuit Judges.

PER CURIAM.

Betzaida P. Jernigan appeals from a decision of the United States Court of Appeals for Veterans Claims (“Veterans Court”) dismissing her appeal of a January 29, 2018 decision of the Board of Veterans’ Appeals (“Board”) for lack of jurisdiction. *Jernigan v. Wilkie*, No. 18-2918, 2019 WL 273140 (Vet. App. Jan. 22, 2019). Because the Veterans Court correctly concluded that it lacked jurisdiction over Jernigan’s appeal, *we affirm.*

BACKGROUND

Jernigan served on active duty in the United States Navy from April 1989 until May 1995.

In a decision dated January 29, 2018, the Board granted Jernigan service connection for right shoulder arthritis with tendinitis and right upper extremity cervical radiculopathy. Resp't Suppl. App. ("S. App.") 11-26. In the "Introduction" section of that decision, the Board explained relevant procedural history, including that the issue on appeal before it was one of several issues addressed by an earlier, June 2016 Board decision. *Id.* at 1. Specifically, the Board indicated that the 2016

decision: (1) remanded Jernigan's claim for entitlement to service connection for a right shoulder disorder (the sole issue before the 2018 Board); and (2) explained that Jernigan's "claims of entitlement to earlier effective dates for grants of service connection for gastroesophageal disease, a lumbar spine disorder, and appendectomy scar were no longer in appellate status as [she] had exhausted her remedies." *Id.* at 13.

Jernigan filed a Notice of Appeal to the Veterans Court, challenging the Board's January 2018 decision. Jernigan, 2019 WL 273140, at *1. Jernigan later clarified that she

was only appealing the Board's January 2018 remarks in its introduction that her earlier effective date claims for gastroesophageal disease, lumbar spine disorder, and appendectomy scar were not in appellate status. *Id.* Because the Board's 2018 decision on appeal was favorable to Jernigan, and because Jernigan stated that she only objected to statements in that decision regarding a prior, now final claim, the Veterans Court ordered Jernigan to show cause why her appeal should not be dismissed for lack of jurisdiction. *Id.*

In response, Jernigan reiterated that

A6

she was not challenging the Board's January 2018 grant of benefits for right shoulder arthritis. Instead, she disputed "an unfavorable conclusion" in the Board's decision that, according to Jernigan, changed her "appeal status relating to a separate matter . . . submitted on a valid Notice of Disagreement in June 2014." *Id.*

In a decision dated January 22, 2019, the Veterans Court dismissed Jernigan's appeal for lack of jurisdiction. In doing so, the court explained that the Board's January 2018 decision was favorable to Jernigan and that the remarks in the introduction section of the Board's decision did not change the appellate

status of her other earlier effective date of claims. *Id.* The court further explained that Jernigan's earlier effective date claims—for gastroesophageal disease, a lumbar spine disorder, and an appendectomy scar—were previously appealed to the Veterans Court and were denied. *Id.* at *1 n.2 (citing *Jernigan v. Shinseki*, 25 Vet. App. 220 (2012), *aff'd* 521 F. App'x 931 (Fed. Cir. 2013), cert. denied 572 U.S. 1062 (2014)). Those earlier claims were not before the Board when it rendered its 2018 decision and are not before this court on appeal. Jernigan moved for reconsideration by a panel. S. App. 6. The Veterans Court granted the motion, and the panel

held that the January 2019 single-judge order would remain the decision of the court. The court entered final judgment on April 12, 2019. This appeal followed.

DISCUSSION

Our jurisdiction to review Veterans Court decisions is limited by statute. Pursuant to 38 U.S.C. § 7292(a), the court may review “the validity of a decision of the [Veterans] Court on a rule of law or of any statute or regulation ... or any interpretation thereof (other than a determination as to a factual

matter) that was relied on by the [Veterans] Court in making the decision.” Unless the case presents a constitutional issue, we “may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.” 38 U.S.C. § 7292(d)(2). We have recognized, however, that the “jurisdictional reach of the Veterans Court presents a question of law for our plenary review.” *Maggitt v. West*, 202 F.3d 1370, 1374 (Fed. Cir. 2000).

On appeal, the government argues that we should dismiss this appeal for lack of jurisdiction because, although Jernigan asserts in her informal brief that the Veterans

Court's decision involved the validity or interpretation of a statute or regulation, review of the court's decision makes clear it did not engage in that type of analysis. Nor did it decide any Constitutional issues.¹ Instead, the Veterans Court dismissed Jernigan's appeal for lack of jurisdiction.

By statute, the Veterans Court's jurisdiction is limited to review of final Board decisions that are adverse to the claimant. 38 U.S.C. § 7266(a); *Bond v. Derwinski*, 2 Vet.

A11

¹ Indeed, Jernigan expressly indicates in her informal brief that the Veterans Court's decision did not decide a constitutional issue. Appellant Informal Br. 1, item 3.

U.S.C. 7266(A); Bond v. Derwinski, 2 Vet.
App. 376, 377 (1992). A claimant therefore
must be "ad-

versely affected” by a decision of the Board in order to appeal to the Veterans Court. *Zevalkink v. Brown*, 102 F.3d 1236, 1243 (Fed. Cir. 1996) (noting that the Veterans Court “considers this a ‘standing’ requirement and that a party must, therefore, show some actual or threatened injury”). Accordingly, the Veterans Court lacks jurisdiction over Board decisions that are favorable to the veteran. *Woods v. Shinseki*, 492 F. App’x 112, 114 (Fed. Cir. 2012) (“Because the Board’s holding reinstated his benefits and was therefore favorable to [the veteran], the Veterans Court appropriately dismissed his appeal.”). Here,

the Board's January 2018 decision that Jernigan appealed to the Veterans Court addressed a single issue: entitlement to service connection for a right shoulder disorder. The Board granted that claim, awarding service connection for right shoulder arthritis with tendinitis and right upper extremity cervical radiculopathy.

Before the Veterans Court, Jernigan made clear that she is not dissatisfied with the Board's decision in this appeal—only with its recitation of procedural history relating to other claims that

were separately adjudicated in full.²

Because the Board's 2018 decision granted Jernigan the benefits she sought and thus was entirely in her favor, there was no adverse action she could appeal to the Veter-

A15

² As the Veterans Court noted, Jernigan's earlier effective date claims for gastroesophageal reflux disease, a lumbar spine disorder, and an appendectomy scar were considered and denied by the Board in 2010, the Veterans Court in 2012, and this court in 2013. Jernigan, 2019 WL273140, at *1, n.2. To the extent Jernigan's informal brief seeks to assert clear and unmistakable error relating to those claims, she cannot do so for the first time on appeal.

ans Court. See 38 U.S.C. § 7266(a).
Accordingly, the Veterans Court did not err
when it dismissed Jernigan's appeal for lack of
jurisdiction.

CONCLUSION

Because the Veterans Court correctly
concluded that it lacked jurisdiction over
Jernigan's appeal, we affirm.

AFFIRMED

COSTS

No costs.

APPENDIX B

Not Published

UNITED STATES COURT OF APPEALS FOR
VETERANS CLAIMS

NO: 18-2918

BETZAIDA P. JERNIGAN, APPELLANT,

V.

ROBERT L. WILKIE,

SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

JUDGMENT

The Court has issued a decision in this case, and has acted on a motion under Rule 35 of the Court's Rules of Practice and Procedure.

Under Rule 36, judgment is entered and effective this date.

B1

Dated: April 12, 2019

FOR THE COURT

GREGORY O. BLOCK

Clerk of the Court

By: /s/ Juanita Coghill

Deputy Clerk

Copies to:

Betzaida P Jernigan

VA General Counsel (027)

B2

APPENDIX C

Not published

NON-PRECEDENTIAL

**UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

NO. 18-2918

BETZAIDA P. JERNIGAN, APPELLANT,

V.

ROBERT L. WILKIE,

SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before BARTLEY, MEREDITH, and TOTH,

Judges.

ORDER

C1

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

In a January 22, 2019, dispositive order, the Court dismissed for lack of jurisdiction the appellant's appeal of a January 29, 2018, decision of the Board of Veterans' Appeals granting VA disability benefits for right shoulder arthritis with tendinitis and right upper extremity cervical radiculopathy. On January 24, 2019, the appellant filed a timely motion for panel decision. The motion for decision by a panel will be granted.

Based on review of the pleadings, it is the decision of the panel that the appellant fails to demonstrate that 1) the single-judge

order overlooked or misunderstood a fact or point of law prejudicial to the outcome of the appeal, 2) there is any conflict with precedential decisions of the Court, or 3) the appeal otherwise raises an issue warranting a precedential decision. U.S. VET. APP. R. 35(e); see also Frankel v. Derwinski, 1 Vet.App. 23, 25-26 (1990).

Absent further motion by the parties or order by the Court, judgment will enter on the underlying single-judge order in accordance with Rules 35 and 36 of the Court's Rules of Practice and Procedure.

Upon consideration of the foregoing, it is further

ORDERED, by the panel, that the
single-judge order remains the decision of the
Court.

DATED: March 21, 2019 PER CURIAM

Copies to:

Betzaida P Jernigan

VA General Counsel (027)

APPENDIX D

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR
VETERANS CLAIMS

No. 18-2918

BETZAIDA P. JERNIGAN, APPELLANT,

V.

ROBERT L. WILKIE,

SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before MEREDITH, Judge.

O R D E R

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

D1

The pro se appellant, Betzaida P. Jernigan, filed a Notice of Appeal (NOA) from a January 29, 2018, decision in which the Board of Veterans' Appeals (Board) granted benefits for right shoulder arthritis with tendinitis and right upper extremity cervical radiculopathy.

On August 7, 2018, the Secretary served the record before the agency (RBA) on the appellant and filed notice with the Court that he had done so. Several days later, the appellant filed a dispute with the RBA, in which she stated that she was appealing "only the part of the Board's [January 2018] remarks in the introduction that concluded

that [former] claims of entitlement for an earlier effective date [prior to October 31, 2001,] for the grants of service connection for "gastroesophageal reflux disease (GERD), a lumbosacral strain, and an appendectomy scar were not in appellate status.¹ Appellant's RBA Dispute at 1 (alterations in original).

Because the Board decision on appeal is favorable to the appellant, and because the appellant stated in her RBA dispute that she

D3

¹ The Court notes that, in the course of the RBA dispute, the Court has issued several orders, the parties had each filed several additional responses, and the parties have participated in a conference with members of the Court's Central Legal Staff. This matter arrived in chambers of December 18, 2018,

only objected to statements in the introduction of the Board's decision regarding a prior, now final, claim, on December 20, 2018, the Court ordered the appellant to show cause why her appeal should not be dismissed for lack of jurisdiction.

The appellant filed her response on January 4, 2019. She states that her dispute is not with the Board's January 2018 grant of benefits for right shoulder arthritis, but with "an unfavorable conclusion in the January 29, 2018 [Board decision] changing [her] appeal status relating to a separate matter . . . submitted on a valid Notice of Disagreement" in June 2014. Appellant's January 4, 2019, Response at 3.

However, the Board in January 2018 did not change the "appellate status" of any of the appellant's claims. Rather, in its recitation of the procedural history of the appellant's appeal, the Board explained that, in a June 2016 decision, the Board had "explained why the claims of entitlement to earlier effective dates for the grants of service connection for [GERD], a lumbar spine disorder, and appendectomy scar were no longer in appellate status[,] as the [appellant] had exhausted her remedies." January 29, 2018, Board Decision.

D5

2 As noted to the December 20, 2018, order, the appellant is before this Court for the second time. In

June 2012, a panel of the Court affirmed a March 23, 2010, Board decision that denied her request for an effective date prior to October 31, 2001, for the award of benefits for GERD, a lumbosacral strain, and an appendectomy scar *Jernigan v. Sjhinseki*, 25 Vet. App. 200 (2012, aff'd 521 F. Appx. 931 (Fed. Cir. 2013, cert. denied 572 U.S. 1062 (2014)). That decision is final.

Because this Court adheres to the case or controversy jurisdictional restraints provided for in Article III of the U.S. Constitution, the Board decision sought to be appealed must be adverse to the appellant. See *Mokal v. Derwinski*, 1 Vet.App. 12, 13-15 (1990); see also *McRae v. Brown*, 9 Vet.App.

229, 233 (1996) (per curiam). Here, the January 2018 Board decision on appeal is favorable to the appellant: The Board granted benefits for a right shoulder disability with upper extremity cervical radiculopathy, which, according to the Board, was the only claim that was before it. The appellant expressly does not challenge that decision. Because the Board's decision was fully favorable to the appellant, there is no adverse decision that she may appeal to the Court. See 38 U.S.C. § 7266; see also *Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007); *Bond v. Derwinski*, 2 Vet.App. 376, 377 (1992) (per curiam order) ("This Court's jurisdiction is confined to the review of final Board . . . decisions which are

adverse to a claimant.").

Upon consideration of the foregoing, it is

ORDERED that this appeal is DISMISSED for
lack of jurisdiction.

DATED: January 22, 2019 BY THE COURT:

s/ AMANDA L. MEREDITH

Judge

Copies to: Betzaida P. Jernigan

VA General Counsel (027).

D8

APPENDIX E

DEPARTMENT OF VETERANS AFFAIRS

Board of Veterans' Appeals

Washington DC 20001

May 3, 2018

In Reply Refer To: O1C2

JERNIGAN, Betzaida P.

Ms. Betzaida P. Jernigan

471 East Kicklighter Road

Lake Helen, FL 32744

Ruling on Motion

Dear Ms. Jernigan:

This letter responds to your Motion for Reconsideration of the Board of Veterans' Appeals (Board) decision of January 29, 2018.

E1

The Motion was received at the Board on February 8, 2018. I am also in receipt of your additional correspondence. The items of correspondence have been associated with your file. I have been delegated the authority to rule on the Motion. See 38 C.F.R. § 20.102(a).

A Board decision is final unless the Board's Chairman, or her delegate, orders reconsideration to correct an obvious error in the record. 38 U.S.C. §§ 7103, 7104; 38 C.F.R. §§ 20.1000, 20.1001. Under 38 C.F.R. § 20.1000, the discretion of the Chairman or her delegate to grant reconsideration of an appellate decision is limited to the following grounds: (a) upon allegation of obvious error of

fact or law; (b) upon discovery of new and material evidence in the form of relevant records or reports of the service department concerned; or (c) upon allegation that an allowance of benefits by the Board has been materially influenced by false or fraudulent evidence submitted by or on behalf of the appellant. I will consider your Motion under both the theory that the Board committed an obvious error of fact or law (38 C.F.R. § 20.1000(a)) and that you have submitted new and material evidence (38 C.F.R. § 20.1000(b)).

The Chairman, or her delegate, will order reconsideration of an appellate decision upon the ground of "obvious error of fact or

law” only when it is shown that the Board committed an error in its decision which, if corrected, would change the outcome of the appeal. Obvious (or clear and unmistakable) error is a very specific and rare kind of error. It is the kind of error of fact or law that, when called to the attention of adjudicators, compels the conclusion, with which reasonable minds could not differ, that the result would have been manifestly different but for the error. Mere allegations that previous adjudicators improperly weighed and evaluated the evidence are inadequate to meet the standard of “obvious error,” as are broad allegations of “failure to follow the regulations” or “failure to give due process,” or any other general, non-

specific claim of "error." See *Fugo v. Brown*, 6 Vet. App. 40, 44 (1993). The alleged error(s) of fact or law must be described with some specificity and persuasive reasons must be given as to why the result would have been manifestly different but for the alleged error. *Id.* Moreover, reconsideration will not be granted on the basis of an allegation of factual error where there is a plausible basis in the record for the factual determinations in the Board decision at issue. This includes situations in which a Board decision reflects the reasonable judgment of one or more of its Veterans Law Judges regarding the credibility, probative value, and weight of the evidence.

In its January 29, 2018, decision, the Board granted your appeal for entitlement to service connection for a right shoulder disorder, to include as secondary to service connected cervical spine degenerative disc disease. This is a fully favorable finding and not a proper basis for reconsideration. Therefore, your Motion with respect to this issue does not meet the requirements for reconsideration, and is dismissed.

I note your request for an earlier effective date regarding this claim. If you would like to file a new claim, or a claim to reopen, you may submit that claim and any pertinent evidence to your local VA regional office.

I hope this information is helpful to you.
Should you have any questions concerning this
letter, you may contact the Board's Status
Line at 1-800-923-8387.

Sincerely yours,

s/ K. Osborne

Deputy Vice Chairman

Board of Veterans' Appeals

Enclosure:

Your Appellate Rights Relating to Our Denial
of Your Motion for Reconsideration.

E7

APPENDIX F

Citation Nr: 1625132

Decision Date: 06/22/16 Archive Date:

07/11/16

DOCKET NO. 04-03 446A) DATE

)

)

On appeal from the

Department of Veterans Affairs Regional

Office in St. Petersburg, Florida

THE ISSUES

1. Entitlement to service connection for a right shoulder disorder, to include as secondary to service-connected chronic cervical spine strain with degenerative disc disease (cervical spine disability).

F1

2. Entitlement to service connection for labyrinthitis with vertigo.

3. Entitlement to service connection for tension headaches, to include as secondary to service-connected cervical spine disability.

4. Entitlement to an effective date earlier than November 22, 2003 for the grant of a total disability rating based on individual unemployability due to service-connected disabilities (TDIU).

WITNESS AT HEARING ON APPEAL

The Veteran

ATTORNEY FOR THE BOARD

C. Smith, Associate Counsel

INTRODUCTION

The Veteran served on active duty in the U.S. Navy from April 1989 until May 1995.

This case comes before the Board of Veterans' Appeals (Board) on appeal from April 2005, August 2006, and September 2008 rating decisions by the Department of Veterans Affairs (VA) Regional Office (RO) in St. Petersburg, Florida.

The issue of entitlement to service connection for a right shoulder disorder was remanded by the Board in July 2009. All issues on appeal were again remanded by the Board in June 2014, and have since been returned to the

Board for further appellate review. ‘

In October 2009 the Veteran presented testimony before a Veterans Law Judge (VLJ) who is no longer at the Board. In an August 2015 letter,

VA informed the Veteran that the prior VLJ was no longer at the Board, and the Veteran elected to have another hearing before the undersigned VLJ in October 2015. A transcript of both hearings is of record.

At the 2015 hearing, the Veteran asserted that additional claims previously denied by the Board in July 2009 remained on appeal. A

review of the record shows that in July 2009, the Board denied the Veteran's claims of entitlement to earlier effective dates for grants of service connection for gastroesophageal disease, a lumbar spine disorder, and appendectomy scar. The Veteran appealed that decision to the United States Court of Appeals for Veterans Claims (Court) who affirmed the Board's decision, and then to the United States Court of Appeals for the Federal Circuit who affirmed the Court, and then to the Supreme Court of the United States where certiorari was denied. See *Jernigan v. Shinseki*, 25 Vet. App. 220 (2012); *Jernigan v. Shinseki*, 521 Fed. Appx. 931 (2013); *Jernigan v. Shinseki*, 134 S. Ct. 1871 (2014). The

Veteran was denied the relief sought at every level, and those issues are no longer before the Board. The issues properly before the Board are reflected on the title page of this document.

This case consists of documents in the Veterans Benefits Management System (VBMS) and in Virtual VA. The Board has reviewed all relevant documents in VBMS and the Virtual VA electronic record. All documents in Virtual VA are duplicative of those in VBMS, or not relevant to the issues on appeal.

The issues of entitlement to service connection

for a right shoulder disorder, and for labyrinthitis are addressed in the REMAND portion of the decision below and are REMANDED to the Agency of Original Jurisdiction (AOJ).

FINDINGS OF FACT

1. The probative medical evidence of record shows that the Veteran's tension headaches are etiologically related to her service-connected cervical spine disorder.

2. The probative medical evidence of record shows that the Veteran was unable to work due to service connected disabilities on March 1, 2003.

3. The Veteran met the schedular criteria for TDIU on March 14, 2003.

4. The Veteran's claim for a TDIU was received by the RO on January 11, 2006.

CONCLUSIONS OF LAW

1. The criteria for service connection for tension headaches as secondary to a service-connected cervical spine disability are met. 38 U.S.C.A. §§ 1110, 1131, 5107 (West 2014); 38 C.F.R. §§ 3.102, 3.303, 3.310 (2015).

2. The criteria for an effective date earlier than November 22, 2003 for the grant of a TDIU are not met. 38 U.S.C.A. §§ 5101, 5110

(West 2014); 38 C.F.R. §§ 3.102, 3.400 (2015).

**REASONS AND BASES FOR FINDINGS
AND CONCLUSIONS**

Duties to Notify and Assist

Generally, upon receipt of a substantially complete application for benefits, VA must notify the claimant of 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 (West 2014); 38 C.F.R. § 3.159(b) (2015); *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).

With regard to the Veteran's claim of entitlement to service connection for tension headaches, in light of the Board's favorable decision, any deficiencies in VA's duties to

notify and assist the Veteran are moot.

With regard to the Veteran's claim for an earlier effective date for the grant of a TDIU, where an underlying claim has been granted and there is disagreement as to "downstream" questions, the claim has been substantiated, and there is no need to provide additional § 5103 notice, nor is there prejudice from absent notice. *Hartman v. Nicholson*, 483 F.3d 1311, 1314-15 (Fed. Cir. 2007); VAOPGCPREC 8-2003 (Dec. 22, 2003).

In addition, the duty to assist the Veteran has also been satisfied in this case. The Veteran's service treatment and personnel records, as

well as identified and available post-service medical records are in the claims file. The Veteran has not identified any available, outstanding records that are relevant to the claims decided herein.

The record also includes written statements provided by the Veteran. Although there are outstanding Social Security Administration (SSA) records, the Board finds that it may proceed to adjudicate the earlier effective date claim. The resolution of this issue turns on the date of the Veteran's claim, as even if these documents indicated an earlier date of entitlement, it would not provide for an earlier

effective date. For these reasons, the Board concludes that VA has fulfilled the duty to assist the Veteran in this case.

The Veteran was also provided with an opportunity to set forth her contentions during the hearing before a VLJ. A Decision Review Officer or VLJ who chairs a hearing must fulfill two duties: (1) the duty to fully explain the issues; and (2) the duty to suggest the submission of evidence that may have been overlooked. 38 C.F.R. § 3.103(c)(2) (2015); *Bryant v. Shinseki*, 23 Vet. App. 488, 496-97 (2010). At the Board hearing, the VLJ outlined the issues on appeal and the hearing focused on the elements necessary to

substantiate the claims. Additionally, additional subsequent development was conducted based on deficiencies in the record, such that the submission of additional evidence is not required. As such, the Board finds that the VLJ complied with the duties set forth in 38 C.F.R. § 3.103(c)(2). There has been no allegation to the contrary. The Board will proceed to address the merits of the claim.

With regard to the Veteran's claim for an earlier effective date, the Board also finds compliance with the June 2014 remand directives. See *Stegall v. West*, 11 Vet. App. 268 (1998). In June 2014 the claim for an earlier effective date was remanded so that the

RO could consider newly received evidence and issue a supplemental statement of the case. A review of the Veteran's claims file shows that all required development has been accomplished in accordance with the Board's remand directives. The RO issued a Supplemental Statement of the Case addressing the newly received evidence. Accordingly, additional remand is not warranted.

Hence, there is no error or issue that precludes the Board from addressing the merits of this appeal.

Service Connection

F15

The Veteran seeks entitlement to service connection for tension headaches, which she asserts are etiologically related to her service-connected cervical spine disorder.

Service connection is warranted for a disability that is aggravated by, proximately due to, or the result of, a service-connected disease or injury. 38 C.F.R. § 3.310 (2015). Any additional impairment of earning capacity resulting from a service-connected condition, regardless of whether the additional impairment is itself a separate disease or injury caused by the service-connected condition, also warrants compensation. *Allen v. Brown*, 7 Vet. App. 439 (1995).

The Board must assess the credibility and weight of all evidence, including the medical evidence, to determine its probative value, accounting for evidence which it finds to be persuasive or unpersuasive, and providing reasons for rejecting any evidence favorable to the Veteran. When there is an approximate balance of evidence for and against the issue, reasonable doubt will be resolved in the Veteran's favor. 38 U.S.C.A. § 5107(b) (West 2014); 38 C.F.R. § 3.102 (2015); Gilbert v. Derwinski, 1 Vet. App. 49, 53 (1990).

The Veteran is service-connected for a cervical spine disability, effective April 28, 2004.

The Veteran was afforded a VA examination in July 2006. At that time she reported that she had headaches dating back to 1994 that had continued since. She stated that her headaches would begin in the cervical region of her neck and wrap around to her temporal regions. Upon review of the Veteran's claims folder and an in-person examination, the examiner diagnosed tension headaches. The examiner opined that it was as likely as not that the Veteran's headaches were proximately due to her service-connected cervical spine disorder, as radiating tension-type headaches were consistent with cervical disc disease.

Based on the foregoing, the Board finds that entitlement to service connection for tension headaches is warranted. The Veteran is currently diagnosed with tension headaches as indicated by the July 2006 examiner. See 38 C.F.R. § 3.303(a). The July 2006 examiner has opined that the Veteran's tension headaches are etiologically related to the Veteran's service-connected cervical spine disability. The Board finds the opinion of the July 2006 examiner to be adequate, as it was based on a full review of the Veteran's medical history, claims file, and in-person examination, and was also supported by an adequate rationale. There is no conflicting medical opinion of

record regarding whether the Veteran's tension headaches are caused by the service-connected cervical spine disorder.

Thus, resolving all reasonable doubt in the Veteran's favor, the Board finds that the Veteran's tension headaches are etiologically related to her service-connected cervical spine disorder. Having met the criteria for secondary service connection, entitlement to service connection for tension headaches as secondary to service-connected cervical spine disorder is warranted. 38 U.S.C.A. §§ 1110, 1131, 5107; 38 C.F.R. §§ 3.102, 3.303, 3.310.

Earlier Effective Date

The Veteran seeks an effective date earlier than November 22, 2003 for the grant of a TDIU. In essence, she claims that the effective date should be the date on which she was determined to be unable to work due to her service-connected disabilities.

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) (West 2014); 38 C.F.R. § 3.400 (2015). With regard to the date of entitlement, the term "date entitlement arose" is not defined in the current statute or regulation. However, it is the date when the

claimant met the requirements for the benefits sought, which is determined on a "facts found" basis. 38 U.S.C.A. § 5110(a); McGrath v. Gober, 14 Vet. App. 28, 35 (2000). An effective date generally can be no earlier than the "facts found." DeLisio v. Shinseki, 25 Vet. App. 45 (2011). These "facts found" include the date the disability first manifested and the date entitlement to benefits was authorized by law and regulation. See generally 38 C.F.R. § 3.400. For instance, if a claimant filed a claim for benefits for a disability before he actually had the disability, the effective date for benefits can be no earlier than the date the disability first manifested. Ellington v. Peake, 541 F.3d 1364, 1369-70 (Fed. Cir. 2008).

With regard to the date of claim, a claim is defined as 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). Any communication or action that (1) indicates an intent to apply for one or more VA benefits and (2) identifies the benefit sought may be considered an informal claim. 38 C.F.R.

§ 3.155(a). When determining the effective date of an award of compensation benefits, VA must review all the communications in the file, after the last final disallowance of the claim, that could be interpreted to be a formal or informal claim for benefits. *Servello v. Derwinski*, 3 Vet. App. 196, 198 (1992). VA

has a duty to fully and sympathetically develop the Veteran's claim to its optimum, which includes determining all potential claims raised by the evidence and applying all relevant laws and regulations. *Harris v. Shinseki*, 704 F.3d 946, 948-49 (Fed. Cir. 2013); *Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001).

A TDIU may be assigned if the Veteran is unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities, provided that: if the Veteran has only one such disability, the disability must be rated at 60 percent or more; or, if the Veteran has two or more disabilities,

at least one disability is rated at 40 percent or more, and additional disabilities bring the Veteran's combined disability rating to 70 percent or more. 38 C.F.R. §§ 3.340, 3.341, 4.16(a) (2015). Nevertheless, even when the percentage requirements are not met, entitlement to TDIU on an extraschedular basis may be granted in exceptional cases when the veteran is unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities. 38 C.F.R. § 4.16(b).

In this case, the Veteran has been granted service connection for multiple disabilities. The Veteran's combined evaluation was 40%

effective October 31, 2001, due to service-connected residuals of appendectomy (0%), gastroesophageal reflux disease (GERD) (30%), and chronic lumbosacral strain (20%). Effective March 14, 2003, the combined evaluation was 70%, due to service-connected GERD (30%), chronic lumbosacral strain (40%), right leg radiculopathy/peripheral neuropathy (20%), and residuals of appendectomy (0%).

In a June 2002 letter, the Veteran stated that she was unable to drive longer than 30 minutes, sit longer than one hour, or stand longer than 15 minutes. The Veteran expressed fear that the school she was

attending would not provide accommodations to allow her to continue her studies, and that she would therefore be unable to pursue her desired future career.

In a claim received by the RO on March 14, 2003, the Veteran requested service connection for right and left leg conditions secondary to her service-connected lumbar spine disability.

In May 2003, the Veteran's physician wrote a letter to the Veteran's university requesting that they permit the Veteran additional time to complete her coursework due to the limitations from the chronic pain in her back.

The physician stated the Veteran had difficulty standing or sitting for long periods of time. In a June 2003 reply, the Veteran's university agreed to the necessary accommodations.

In a July 8, 2003 statement, the Veteran reported frequent falls due to her service connected lumbar spine disability, and reported that she was experiencing increasing difficulty going to her classes.

In a June 2004 letter from Mid Florida Community Services, it was noted that the Veteran volunteered 207 hours with the Osteen

Head Start Center from 2003 until 2004, where she served on the parent committee, as a policy council representative, as a classroom volunteer, as a field trip chaperone, and on several additional committees.

On January 11, 2006, the RO received from the Veteran an application for increased compensation based on unemployability. The Veteran reported that she had been employed as a teacher until May 2001.

In an October 2007 letter from the Florida Department of Education, the Veteran was notified that it had been determined that she was not eligible for vocational rehabilitation

service because her disability was too severe at that time for rehabilitation service to result in an employment outcome.

In a March 2008 letter, the Veteran's physician, Dr. MM, reported that due to her cervical and lumbar disc disease, the Veteran was unable to engage in any occupation due to her inability to bend, lift, reach, squat or kneel without severe discomfort; inability to sit for an extended period of time; inability to walk more than a short distance; and inability to stand for any length of time. In an accompanying Loan Discharge Application, Dr. MM wrote that the Veteran was unable to

work and earn money in any capacity as of March 1, 2003 due to cervical disc disease and lumbar disc disease.

In an August 2008 rating decision, the RO granted TDIU, effective March 14, 2003. In a September 2008 rating decision, the RO informed the Veteran that the original March 14, 2003 date of entitlement to a grant of TDIU was in error. The RO then changed the date of entitlement to TDIU to November 22, 2003, which the RO determined to be the actual date of eligibility. No further explanation was provided. In a June 2011 statement of the case, the RO informed the Veteran that the November 22, 2003 date was

also wrong; and that the correct effective date was January 11, 2006, the date that the Veteran's claim of entitlement to TDIU was received; the RO did not, however, effectuate that change.

Based on the foregoing, the Board finds that entitlement to an effective date earlier than November 22, 2003 for the grant of TDIU is not warranted. Resolving all reasonable doubt in the Veteran's favor, the medical evidence shows that she was unable to follow a substantially gainful occupation as of March 1, 2003 due to her cervical spine and lumbar spine disabilities. See March 2008 Dr. MM letter. The Board notes, however, that the

Veteran's cervical spine disability was not service-connected until April 28, 2004. See January 24, 2006 Rating Decision. Dr. MM's letter was not submitted to the RO until April 2008. The Veteran was not entitled to a schedular TDIU until March 14, 2003, when her lumbar spine disability evaluation was increased to 40 percent, and her combined disability evaluation was 70 percent. See 38 C.F.R. §§ 3.340, 3.341, 4.16(a). It appears there may have been evidence that the requirements for an extra-schedular TDIU were warranted as of March 1, 2003. See 38 C.F.R. § 4.16(b). The Veteran's formal claim for a TDIU was received on January 11, 2006.

In short, the medical evidence shows that the Veteran could not work as of March 1, 2003, thus, this is the date of potential extra-schedular entitlement. The Veteran met the schedular requirements for TDIU on March 14, 2003, thus, this is the date of schedular entitlement. The date of entitlement to TDIU is therefore either March 1, 2003 or March 14, 2003, and the date of the claim is January 11, 2006. Thus, the proper effective date is January 11, 2016. The Veteran is already in receipt of an effective date of November 22, 2003 for the grant of TDIU. Accordingly, to be entitled to an effective date for TDIU prior to November 22, 2003, there must be a formal or informal claim for TDIU between March 1,

2003 and November 22, 2003. A TDIU claim prior to March 1, 2003 would fail, as the medical evidence does not show that the Veteran was unable to work prior to that date.

The record from March 1, 2003 to November 22, 2003 does not contain any document or assertion that constitutes a formal or informal claim for TDIU. Although the Veteran repeatedly expressed concern about difficulty pursuing higher education due to her disabilities, the evidence shows that the Veteran's school allowed her accommodations for the 2003 year and she was able to attend. See June 2003 letter from Liberty University. In addition, the Veteran did extensive

volunteer work during the 2003 to 2004 school year. See June 2004 letter from Mid Florida Community Services. Although the date on which the entitlement to TDIU arose predates the Veteran's January 11, 2006 date of claim, pursuant to 38 C.F.R. § 3.400, the earliest date on which entitlement to a TDIU can be granted is either the date the entitlement arose, or the date the claim was received, whichever is later in time. As the date of the Veteran's claim for TDIU was later in time than the date the entitlement arose, by law the date of the Veteran's claim is the proper effective date for entitlement to a TDIU.

In an April 2015 statement, the Veteran asserted that VA erred in failing to provide her with an examination following the submission of an informal claim for benefits in 1995. It appears that the Veteran is arguing that had VA promptly scheduled those examinations, she would have been assessed as totally and permanently disabled sooner. The Veteran also appears to argue that her psychiatric disorder should have been adjudicated sooner, and that it also contributed to her unemployability. The Veteran further asserted that VA should afford great weight to the March 2008 statement from Dr. MM in which Dr. MM

reported that the Veteran was totally and permanently disabled due to her disabilities. Despite any allegations that VA failed to promptly provide the Veteran with an examination following an informal 1995 claim, the letter from Dr. MM, on which the Veteran asks us to rely, states that she was unable to work as of March 1, 2003. Moreover, the record shows that the Veteran was employed until 2001. Again, although the date of entitlement predates the date of the claim, the date of the claim remains the proper effective date for the grant of TDIU. The Veteran is already in receipt of an effective date earlier than January 11, 2006, and the Board does not disturb that determination; however,

entitlement to an effective date earlier than November 22, 2003 is denied. 38 U.S.C.A. §§ 5101, 5110 (West 2014); 38 C.F.R. §§ 3.102, 3.400 (2015). As the evidence preponderates against the claim, there is no reasonable doubt to be resolved. *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990).

ORDER

Entitlement to service connection for tension headaches as secondary to the service-connected cervical spine disability is granted.

Entitlement to an effective date earlier than November 22, 2003 for the grant of TDIU is

denied.

REMAND

With regard to the Veteran's claims of entitlement to service connection for a right shoulder disorder and for labyrinthitis with vertigo, remand is required to obtain Social Security Administration (SSA) records, and to afford the Veteran adequate VA examinations.

VA's duty to assist claimants to obtain evidence needed to substantiate a claim includes making as many requests as are necessary to obtain relevant records from a Federal department or agency, including, but not limited to, the Social Security

Administration (SSA). 38 U.S.C.A. § 5103A (West 2014); 38 C.F.R. § 3.159(c) (2015); Golz v. Shinseki, 590 F.3d 1317 (Fed. Cir. 2010). At the October 2015 hearing, the Veteran indicated that she may be in receipt of SSA benefits. The claims file does not contain a copy of the decision to grant benefits, or the records upon which that decision was based, or an indication that attempts were made to obtain these records. Therefore, the AOJ should attempt to obtain the Veteran's SSA records.

Regarding the Veteran's claim of entitlement to service connection for a right shoulder

disorder, remand is required to secure an adequate VA opinion regarding the nature and etiology of any currently present right shoulder disorder.

At a May 2011 VA shoulder examination, the Veteran reported pain beginning at the base of her neck and radiating to her shoulder. The examiner noted minimal degenerative arthritis of the right shoulder and acromioclavicular. The examiner stated that the Veteran's shoulder pain was referred pain from her cervical disc disease and not related to any shoulder pathology. The examiner then opined that the Veteran's arthritic changes were unrelated to service, as the Veteran's

service treatment records were silent for right shoulder injury or pathology. This opinion was previously determined to be inadequate by the Board in a June 2014 decision as the examiner failed to consider August 1989 in-service treatment for right shoulder pain following a lifting injury.

The Veteran was afforded another VA shoulder examination in March 2015. That examiner noted a current diagnosis of degenerative arthritis of the right shoulder, and opined that the Veteran's arthritis was less than likely related to her military service. In support of that opinion, the examiner noted

that the Veteran had one documented complaint of shoulder pain in 1989, and no objective shoulder abnormality until 10 years after service. The Board finds the opinion of the March 2015 examiner to be inadequate as it is supported by an insufficient rationale. Merely noting the one in-service injury and delayed onset of arthritic changes, without more, does not providing a context or explanation for the conclusion that the Veteran's current right shoulder disorder is unrelated to her military service. The examiner also failed to address whether any of the Veteran's right shoulder symptoms were etiologically related to her service-connected cervical spine disorder.

Since the March 2015 VA examination, the Veteran has made additional assertions regarding the etiology of her right shoulder disability that have not yet been addressed by a VA examiner. In an April 2015 letter, the Veteran asserted that while she did not have any additional in-service complaints of right shoulder pain, her duties as a data processor technician required her to regularly lift heavy objects that caused the later development of arthritis in the right shoulder. At an October 2015 hearing, the Veteran reported that her shoulder symptoms, identified as pain and spasms, were related to her neck. On remand, all the Veteran's contentions must be addressed by the VA examiner.

With regard to the Veteran's claim for service connection for labyrinthitis, the Veteran was afforded a VA examination in June 2006. The examiner diagnosed labyrinthitis, but stated that they were unable to opine whether labyrinthitis was etiologically related to the Veteran's period of active service without resorting to mere speculation. No explanation was provided, and the Board finds that opinion to be inadequate. On remand, an adequate opinion with a fully articulated rationale is necessary. If an opinion cannot be reached without resort to mere speculation, that too must be supported by a fully articulated rationale.

Accordingly, the case is REMANDED for the following action:

1. Contact the SSA and obtain a copy of that agency's decision concerning the Veteran's claim for disability benefits, including any medical records used to make the decision. If any requested records are not available, or the search for any such records otherwise yields negative results, that fact must clearly be documented in the claims file. Efforts to obtain these records must continue until it is determined that they do not exist or that further attempts to obtain them would be futile. The non-

existence or unavailability of such records must be verified and this should be documented for the record. Required notice must be provided to the Veteran.

2. Contact the appropriate VA Medical Center(s) and obtain and associate with the claims file all outstanding records of treatment. If any requested records are not available, or the search for any such records otherwise yields negative results, that fact must clearly be documented in the claims file. Efforts to obtain these records must continue until it is determined that they do not exist or that further attempts to obtain them

would be futile. The non-existence or unavailability of such records must be verified and this should be documented for the record. Required notice must be provided to the Veteran.

3. Contact the Veteran and afford her the opportunity to identify by name, address and dates of treatment or examination any relevant medical records. Subsequently, and after securing the proper authorizations where necessary, make arrangements to obtain all the records of treatment or examination from all the sources listed by the Veteran which are not already on file. All information obtained must be made part of the file. All attempts to

secure this evidence must be documented in the claims file, and if, after making reasonable efforts to obtain named records, they are not able to be secured, provide the required notice and opportunity to respond to the Veteran.

4. After any additional records are associated with the claims file, provide the Veteran with an appropriate examination to determine the nature and etiology of any currently present right shoulder disorder, to include tendinosis, cervical radiculopathy, and degenerative arthritis. The entire claims file, including a copy of this remand, should be made available to and be reviewed by the examiner. Any indicated tests and studies

must be accomplished and all clinical findings must be reported in detail and correlated to a specific diagnosis. An explanation for all opinions expressed must be provided.

The examiner is requested to provide the following information and opinions:

(a) Whether it is at least as likely as not (50 percent or greater probability) that each currently present right shoulder disorder, including tendinosis, cervical radiculopathy, and degenerative arthritis, had onset in, or is otherwise related to, the Veteran's period of active service. The examiner is asked to

to consider: (1) the Veteran's August 1989 right shoulder injury with pain; (2) the Veteran's statement that her right shoulder disorder is etiologically related to repeatedly lifting heavy objects while in service.

(b) Whether it is at least as likely as not (50 percent or greater probability), that each currently present right shoulder disorder, including tendinosis, cervical radiculopathy, and degenerative arthritis, is caused by her service-connected cervical spine disability. The examiner is asked to consider: (1) the August 2005 private physician diagnosis of cervical radiculopathy; (2) The May 2011 VA

examiner's opinion that the Veteran's shoulder pain was referred pain from her cervical disc disease.

(c) Whether it is at least as likely as not (50 percent or greater probability) that each currently present right shoulder disorder, including tendinosis, cervical radiculopathy, and degenerative arthritis, is aggravated (chronically worsened beyond the natural progress of the disability) by her cervical spine disability. If aggravation is found, the examiner should attempt to quantify the degree of additional disability resulting from the aggravation.

5. After any additional records are associated with the claims file, provide the Veteran with an appropriate examination to determine the nature and etiology of the Veteran's claimed labyrinthitis, characterized by dizziness, tinnitus, and difficulty balancing. The entire claims file, including a copy of this remand, should be made available to and be reviewed by the examiner. Any indicated tests and studies must be accomplished and all clinical findings must be reported in detail and correlated to a specific diagnosis. An explanation for all opinions expressed must be provided.

The examiner must provide an opinion

regarding whether it is at least as likely as not (50 percent or greater probability) that the claimed labyrinthitis was caused or aggravated by the Veteran's military service. The examiner must specifically address the following: (1) the Veteran's separation examination noting "ETDx: causing vertigo;" (2) the Veteran's separation report of medical history in which she reports dizziness and the accompanying physician note that reported the Veteran had episodes of dizziness consistent with labyrinthitis; (3) a December 2004 private medical record noting longstanding complaints of dizziness; (4) a May 2005 VA progress note that reported the Veteran had episodes of dizziness since her

time in the military; (5) a November 2009 private medical record noting that the Veteran's intermittent vertigo and tinnitus were related to a peripheral vestibular dysfunction; and (6) the June 2006 VA examination.

6. Notify the Veteran that it is her responsibility to report for any scheduled examination and to cooperate in the development of the claims, and that the consequences for failure to report for a VA examination without good cause may include denial of the claims. 38 C.F.R. §§ 3.158, 3.655 (2015). In the event that the Veteran does not report for any scheduled examination,

documentation must be obtained which shows that notice scheduling the examination was sent to her last known address. It must also be indicated whether any notice that was sent was returned as undeliverable.

7. Review the examination reports to ensure complete compliance with the directives of this remand. If the report is deficient in any manner, the AOJ must implement corrective procedures. *Stegall v. West*, 11 Vet. App. 268, 271 (1998).

8. After completing the above action, and any other development as may be indicated by any response received as a consequence of the

actions taken in the paragraphs above, the claims must be readjudicated. If the claims remain denied, a supplemental statement of the case must be provided to the Veteran. After the Veteran has had an adequate opportunity to respond, the appeal must be returned to the Board for appellate review.

The Veteran 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 2014).

K. MILLIKAN

Veterans Law Judge, Board of Veterans'
Appeals
Department of Veterans Affairs