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United States Court of Appeals
for the Federal Circuit

SOLENA Y. HAMPTON,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2022-1359

Appeal from the United States Court of Appeals for Veterans Claims in No. 20-4075, Judge Scott Laurer.

Decided: June 5, 2023

SEAN A. RAVIN, Miami, FL, argued for claimant-appellant.

AMANDA TANTUM, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by BRIAN M. BOYNTON, MARTIN F. HOCKEY, JR., PATRICIA M. MCCARTHY; EVAN SCOTT GRANT, Y. KEN LEE, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Before TARANTO, CLEVENGER, and HUGHES, *Circuit Judges*.

HUGHES, Circuit Judge.

Solena Hampton appeals a decision from the Court of Appeals for Veterans Claims denying an earlier effective date for a total disability rating based on individual unemployability and for dependents' educational assistance. Because the Veterans Court properly interpreted the new and material evidence rule in 38 C.F.R. § 3.156(b), we affirm.

I

Ms. Hampton served in the U.S. Navy from June 1985 to November 1989. In April 1997, she filed a claim for veteran's disability compensation for migraines. The regional office (RO) initially granted her an evaluation of 10 percent for service-connected migraines. In September 1998, the RO increased Ms. Hampton's rating to 30 percent, effective from the 1997 claim date.

In February 1999, Ms. Hampton applied for a total disability rating based on individual unemployability (TDIU)[1] effective as of her initial 1997 claim due to "migraine[s], bladder, [and] reflux." J.A. 309. In March

[1] Along with her TDIU claim, Ms. Hampton also sought dependents' educational assistance. For simplicity, and because an award of dependents' educational assistance is derived from an award of TDIU, we refer to the claims together as her 1999 TDIU claim.

1999,[2] the RO denied TDIU. Ms. Hampton never filed a notice of disagreement with this denial.

Shortly after her 1999 TDIU claim was denied, Ms. Hampton filed a new claim for increased compensation based on her migraines. This claim was denied in June 1999, and Ms. Hampton filed a notice of disagreement for this claim. Ms. Hampton appealed her increased compensation claim to the Board. In November 2000, the Board agreed with the RO in relevant part and denied her request for an increased rating above 30 percent for migraines.

In September 2003, Ms. Hampton filed a new claim for increased compensation for her migraines. At the same time, she also filed a second application for TDIU. After various rounds of appeals, the Board ultimately granted Ms. Hampton TDIU for her migraines and the RO effectuated that decision, thereby granting TDIU effective from September 2003. The RO did not extend Ms. Hampton's effective date back to 1997, which was the date of her original claim for migraines and the date sought by her 1999 TDIU claim.

II

Arguing she was entitled to an earlier effective date of May 1997, Ms. Hampton appealed the RO's decision as to the effective date of her TDIU. She argued

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[2] In other parts of the record, this decision is referred to as the April 1999 decision, rather than the March 1999 decision. The two are the same.

that her 1999 TDIU claim was still pending because she submitted additional evidence within the one-year appeal window of her claim being denied, but she never received a determination about whether this evidence was new and material to the 1999 TDIU claim. Ms. Hampton identified the following evidence as new and material: (1) her May 1999 statement, where she stated her migraines had worsened and for which the RO opened a new claim for increased compensation, and (2) a May 1999[3] Department of Veterans Affairs (VA) examination report, where she reported daily headaches lasting from 2–24 hours.[4] Ms. Hampton argued she was entitled to an explicit new and material evidence determination for this evidence under 38 C.F.R. § 3.156(b).

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[3] Ms. Hampton refers to this as the "June 1999" VA examination report, presumably because there is a June 4, 1999 date on the top left of the report. We refer to it as the "May 1999" report because the date of the examination was May 27, 1999 and because it is referred to as the May 1999 report at other places in the record. The two are the same.

[4] Ms. Hampton also identifies a December 1999 VA neurology clinic note, where she reported increased frequency of headaches and that she sometimes experienced a tingly sensation, and an April 2000 neurology clinic note. But, despite acknowledging the clinic notes in her summary of the facts, Ms. Hampton's appeal to the Veterans Court did *not* argue that either was new and material evidence received by the RO within the one-year appeal window. Thus, Ms. Hampton forfeited any such argument, and we do not consider these two clinic notes on appeal. *Gant v. United States*, 417 F.3d 1328, 1332 (Fed. Cir. 2005) ("Arguments not made in the court or tribunal whose order is under review are normally considered waived.").

In February 2020, the Board denied entitlement to an earlier effective date. It reasoned that Ms. Hampton was not entitled to claim an earlier effective date based on the 1999 TDIU claim because that claim was not still pending when Ms. Hampton filed her new claims in September 2003. Rather, the Board found that its November 2000 decision denying Ms. Hampton's claim for increased compensation for migraines was an implicit denial of the 1999 TDIU claim.

Ms. Hampton appealed to the Veterans Court, arguing that the Board erred by (1) not discussing whether her May 1999 statement and May 1999 exam constituted new and material evidence under 38 C.F.R. § 3.156(b), and (2) finding that its November 2000 decision was an implicit denial of her 1999 TDIU claim. The Veterans Court rejected both arguments and affirmed the Board's decision. In particular, the Veterans Court held that (1) the Board's 2020 decision satisfied § 3.156(b) by including "statements after the April 1999 rating decision and before the November 2000 Board decision do not re[-]raise the issue of TDIU," *Hampton v. McDonough*, No. 20-4075, 2021 WL 4952747, at *3 (Vet. App. Oct. 26, 2021), and (2) alternatively, the Board's 2000 decision satisfied the regulation because it was an implicit denial of Ms. Hampton's 1999 TDIU claim. Ms. Hampton appeals.

III

Our jurisdiction to review Veterans Court's decisions is limited by 38 U.S.C. § 7292. *Forshey v. Principi*,

284 F.3d 1335, 1338 (Fed. Cir. 2002) (en banc) (superseded by statute on other grounds by Pub. L. No. 107–330, § 402(a), 116 Stat. 2820, 2832 (2002)). Under § 7292, we "may review the validity of the Veterans Court's decision on 'a rule of law or of any statute or regulation' or 'any interpretation thereof' that the Veterans Court relied on in making its decision." *Bond v. Shinseki*, 659 F.3d 1362, 1366 (Fed. Cir. 2011) (quoting 38 U.S.C. § 7292(a)). But we may not review: (1) "a challenge to a factual determination," or (2) "a challenge to a law or regulation as applied to the facts of a particular case," unless the challenge raises a constitutional issue. 38 U.S.C. § 7292(d)(2).

On appeal, Ms. Hampton argues the Veterans Court misinterpreted 38 C.F.R. § 3.156(b). Section 3.156(b) is a VA regulation that provides: "[n] ew and material evidence received prior to the expiration of the" period for appealing a decision "will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period." 38 C.F.R. § 3.156(b). Ms. Hampton argues this regulation requires the RO to review any evidence submitted during the appeal period and explicitly state whether that evidence is new and material to any claim still within the appeal period. By holding that § 3.156(b) was satisfied in Ms. Hampton's case, even though the RO did not make such an explicit determination for her 1999 TDIU claim, Ms. Hampton argues that the Veterans Court misinterpreted § 3.156(b). Thus, we have jurisdiction to address the proper interpretation of § 3.156(b) under 38 U.S.C. § 7292.

We are not persuaded by the government's arguments that Ms. Hampton's appeal only challenges the Veterans Court's factual findings and facts as applied to law, and therefore falls outside our jurisdiction. To the contrary, Ms. Hampton's challenge raises a § 3.156(b) interpretation issue that is similar to previous § 3.156(b) challenges over which we have exercised our jurisdiction. *See*, *e.g.*, *Bond*, 659 F.3d at 1367 ("Whether § 3.156(b) requires the VA to determine if a submission filed during the appeal period constitutes new and material evidence relating to a pending claim is a legal question divorced from the facts of this case."). Here, too, we have jurisdiction over Ms. Hampton's appeal. We review the Veterans Court's interpretation of this regulation de novo. 38 U.S.C. § 7292(c); *Breland v. McDonough*, 22 F.4th 1347, 1350 (Fed. Cir. 2022).

IV

Ms. Hampton's appeal raises the following question of interpretation: whether § 3.156(b) requires the VA to *explicitly* state whether submitted evidence is new and material to a claim, even where that claim is implicitly denied after consideration of the evidence. Following our recent opinion in *Pickett v. McDonough*, we hold that it does not. 64 F.4th 1342 (Fed. Cir. 2023).

In *Pickett*, the veteran filed an initial claim for benefits in April 2004. *Id.* at 1343. In 2010, he was granted service-connected compensation for post-traumatic stress disorder (PTSD) and coronary artery

disease (CAD) effective April 2004. *Id.* Mr. Pickett appealed the 2010 decision, seeking a higher rating for CAD. *Id.* Within the appeal window, Mr. Pickett also filed an application for TDIU (VA Form 21-8940). *Id.* In denying Mr. Pickett's TDIU claim, the RO: (1) listed the VA Form 21-8940 as evidence considered, (2) addressed TDIU entitlement due to CAD, and (3) denied TDIU on the merits. *Id.* at 1343–44. Mr. Pickett never appealed that decision. *Id.* at 1344. Later, when he filed another TDIU claim in 2017, Mr. Pickett argued that his 2004 claim was still pending because the RO did not explicitly state whether VA Form 21-8940 was new and material evidence to his claim seeking a higher CAD rating. *Id.* at 1344. We disagreed, holding that "an implicit finding" that a submission is new and material evidence satisfies § 3.156(b) "so long as there is some indication that the VA determined whether the submission is new and material evidence, and if so, considered such evidence in evaluating the pending claim." *Id.* at 1347.

The facts here are similar to those in *Pickett*. Ms. Hampton filed additional evidence within a year of her 1999 TDIU claim being denied: her May 1999 statement to the RO seeking a higher rating for migraines and a May 1999 VA examination report. The RO's June 1999 decision, and later the Board's 2000 decision, indicated that the RO considered the May 1999 evidence and did not find reason to increase Ms. Hampton's rating for migraines. But like the veteran in *Pickett*, Ms. Hampton argues this was not enough. She argues that the RO was required to make an *explicit* finding that

her May 1999 statement and May 1999 VA examination report were new and material evidence to her 1999 TDIU claim.

This is not what § 3.156(b) requires. Following our precedent in *Pickett*, all that was required to satisfy § 3.156(b) was some indication that (1) the VA had determined that the May 1999 statement and May 1999 VA examination report were new and material, and (2) the VA considered that evidence as to her 1999 TDIU claim. *See id.* Both are satisfied here.

First, in denying Ms. Hampton's claim for increased compensation for migraines, the RO's decision and the Board's 2000 decision each made "some indication that the VA determined whether the submission[s] [were] new and material evidence." *Id.* Similar to the RO decision in *Pickett*, the RO decision here (1) listed the May 1999 VA examination report as evidence considered, (2) addressed what was necessary to warrant an increased rating for migraines, and (3) denied an increase in rating for migraines on the merits. J.A. 301. Although the RO decision did not explicitly list Ms. Hampton's May 1999 statement as evidence considered, it implied that the RO considered this statement new and material evidence because it acknowledged receiving Ms. Hampton's May 1999 statement in support of her claim and necessarily issued the RO decision in response to that statement.

Similarly, the Board's 2000 decision addressed the May 1999 VA examination report and concluded that the medical evidence did not warrant an increased

rating for migraines. Although the Board's 2000 decision did not explicitly cite to Ms. Hampton's May 1999 statement, it acknowledged that it had considered her opinions and views generally. J.A. 274 ("[Ms. Hampton's] views as to the etiology of her pain complaints and/or the extent of functional impairment are specifically outweighed by the medical evidence of record cited above."). Thus, by considering the May 1999 evidence and addressing the merits of that evidence, the RO's decision and the Board's 2000 decision both made the implicit finding that the May 1999 evidence was new and material.

Second, the decisions also indicate that the VA considered the May 1999 evidence as to Ms. Hampton's 1999 TDIU claim. They do so, not explicitly, but implicitly. When a veteran has more than one pending claim but only one of those claims is explicitly denied, a related pending claim may still be deemed implicitly denied. *Deshotel v. Nicholson*, 457 F.3d 1258, 1261 (Fed. Cir. 2006). Here, the Veterans Court found that "[t]he Board, by denying the increased evaluation for migraines, on a schedular and extra[-]schedular basis, also implicitly denied any higher ratings." J.A. 28. We see no legal error with this conclusion. Because the RO's and the Board's decisions indicate that they considered the May 1999 evidence as new and material, and because those decisions implicitly denied TDIU, it follows that the VA considered the May 1999 evidence as to Ms. Hampton's TDIU claim—not just as to her increased rating claim for migraines. Nothing more was required to satisfy § 3.156(b).

We are not persuaded by Ms. Hampton's arguments to the contrary. Ms. Hampton primarily objects to the Veterans Court's conclusion that the Board's 2020 decision made an explicit new and material evidence determination that satisfied § 3.156(b). We agree with Ms. Hampton that the Board's 2020 decision did not satisfy § 3.156(b) by finding "statements after the April 1999 rating decision and before the November 2000 Board decision do not re[-]raise the issue of TDIU." J.A. 27. Determining that later submissions did not re-raise TDIU is different from determining that those submissions are not new and material evidence. But our disagreement with the Veterans Court's conclusion on that point does not change the outcome of this appeal. As discussed above, § 3.156(b) had been satisfied by the RO's 1999 and the Board's 2000 decisions, which implicitly found the evidence to be new and material, *see Pickett*, 64 F.4th at 1347, and considered that evidence before implicitly denying Ms. Hampton's TDIU claim, *see Deshotel*, 457 F.3d at 1261.

Ms. Hampton also argues that the Board cannot make a new and material evidence determination in the first instance—only the RO can. We need not decide that issue here.[5] As explained above, the RO *did* make

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[5] Even so, our precedent appears to allow the Board to make a new and material evidence determination in the first instance to satisfy § 3.156(b). *See Bond*, 659 F.3d at 1368 (noting that the government conceded "nothing in the record indicates that the RO *or Board* made a determination as to whether the February 1998 submission contained new and material evidence" (emphasis added)); *Beraud*, 766 F.3d at 1406 (citing *Bond* for the proposition that "*the Board*" must include a written statement of its findings,

a new and material evidence determination in its June 1999 decision. It just did so implicitly. The Board made that same decision in November 2000. Thus, the Board in its 2020 decision, by finding the 2000 decision an implicit denial of TDIU, was not making a new and material evidence determination in the first instance. The RO was the first to consider that evidence, and it did so in 1999.

We have considered Ms. Hampton's remaining arguments and find them unpersuasive. Because we agree with the Veterans Court that the VA's implicit denial of TDIU satisfied § 3.156(b), we affirm.

AFFIRMED

COSTS

No costs.

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and so we cannot presume that the Board made a new and material evidence determination absent some indication to that effect (emphasis added)).

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 20-4075

SOLENA Y. HAMPTON, APPELLANT,

V.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before LAURER, *Judge*.

MEMORANDUM DECISION

(Filed Oct. 26, 2021)

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

LAURER, *Judge*: United States Navy veteran Solena Y. Hampton appeals, through counsel, a February 25, 2020, Board of Veterans' Appeals (Board) decision denying an effective date before September 8, 2003, for entitlement to a total disability rating based on individual unemployability (TDIU) and for dependents' educational assistance (DEA).[1]

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[1] Record (R.) at 5-6. The Board also denied a rating above 50% for a migraine disability. *Id.* Because appellant does not challenge this part of the Board decision, the Court dismisses the appeal on that matter. *See* Appellant's Brief (Br.) at 1; *see Pederson v. McDonald*, 27 Vet.App. 276, 281-85 (2015) (en banc) (finding that the Court may decline review of an issue appellant has abandoned on appeal). The Court notes that the Secretary filed the initial record of proceedings (ROP) on June 14, 2021. On June 28,

Appellant argues that because she filed documents within 1 year of a final March 1999 rating decision, those documents constitute new and material evidence that a November 2000 Board decision should have considered. She asserts that because the November 2000 Board decision did not explicitly address these documents, a claim for TDIU is still pending.[2] And appellant contends that the Board clearly erred when it found in the alternative that TDIU was implicitly denied in the November 2000 Board decision.[3] The Court finds that the Board did not clearly err in its determination of the appropriate effective date and that it provided adequate reasons or bases to facilitate judicial review. Thus, the Court will affirm the Board's decision.

I. ANALYSIS

Under the applicable version of 38 C.F.R. § 3.156(b), "[n]ew and material evidence received prior to the expiration of the appeal period, or prior to the appellate decision if a timely appeal has been filed . . . will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period."[4] So, under section 3.156(b), VA must consider any new and material evidence received during

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2021, he moved for leave to file an amended ROP, which the Court granted on the same day. All references to the record refer to the amended ROP.

[2] Appellant's Br. at 9-10.

[3] *Id.* at 10.

[4] 38 C.F.R. § 3.156(b) (2021).

the 1-year appeal period following a VA regional office (RO) decision "as having been filed in connection with the claim which was pending at the beginning of the appeal period."[5]

The pertinent question to establish whether section 3.156(b) applies is whether the RO received new and material evidence within the 1-year appeal period.[6] As the United States Court of Appeals for the Federal Circuit (Federal Circuit) said in *Bond* and reaffirmed in *Beraud*, the Board must make an explicit determination whether evidence submitted within 1 year of a decision is new and material.[7]

"A claim for benefits, whether formal or informal, remains pending until it is finally adjudicated."[8] The implicit denial rule provides that in certain circumstances, even if VA does not explicitly address a claim during an adjudication, the claim may still be found denied and thus finally adjudicated.[9] "The 'certain

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[5] *Id.*

[6] *See Bond v. Shinseki*, 659 F.3d 1362, 1367 (Fed. Cir. 201 1) (stating that, under § 3 .156(b), "VA must assess any evidence submitted during the relevant period and make a determination as to whether it constitutes new and material evidence relating to the old claim").

[7] *Beraud v. McDonald*, 766 F.3d 1402, 1406-07 (Fed. Cir. 2014) ("VA's obligations under § 3.1 56(b) are not optional. . . . VA must provide a determination that is directly responsive to the new submission and . . . , until it does so, the claim at issue remains open."); *Bond*, 659 F.3d at 1368.

[8] *Adams v. Shinseki*, 568 F.3d 956, 960 (Fed. Cir. 2009); *see* 38 C.F.R. § 3.160(c) (2021).

[9] *Locklear v. Shinseki*, 24 Vet.App. 311, 315 (2011).

circumstances' are when a reasonable person would understand from a decision that his or her request for benefits not explicitly addressed in the decision nevertheless implicitly was adjudicated and denied by that decision."[10] "[T]he implicit denial rule is, at bottom, a notice provision."[11] And this Court in *Cogburn* distilled four factors the Board must consider when it applies the implicit denial doctrine: (1) specificity or relatedness of the claims, (2) specificity of the adjudication, (3) timing of the claims, and (4) whether the claimant was represented.[12]

The Board must support its findings and conclusions on material issues of fact and law with adequate reasons or bases that help appellant understand the precise basis for its decision and facilitate this Court's review.[13] To satisfy this requirement, the Board must account for evidence it finds persuasive or unpersuasive, analyze the credibility and probative value of relevant evidence, and provide reasons for rejecting any evidence potentially favorable to appellant.[14] The Board here recited this case's procedural history and

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[10] *Locklear*, 24 Vet.App. at 315; *see Jones v. Shinseki*, 619 F.3d 1368, 1373 (Fed. Cir. 2010) ("The key question is whether sufficient notice has been provided so that a veteran would know, or reasonably can be expected to understand, that he [or she] will not be awarded benefits for the disability asserted in [the] pending claim. . . .").

[11] *Adams*, 568 F.3d at 965.

[12] *Cogburn v. Shinseki*, 24 Vet.App. 205, 212-13 (2010).

[13] *Allday v. Brown*, 7 Vet.App. 517, 527 (1995)

[14] *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

noted that appellant did not challenge a September 1998 rating decision that granted an increased disability rating for migraine headaches, nor did she challenge either a March 1999 rating decision that denied entitlement to TDIU or a November 2000 Board decision that denied an increased disability rating for migraines.[15] Accordingly, the Board concluded that those decisions became final.[16]

After discussing finality, the Board found that TDIU was not part of the prior increased rating claim for migraines, and even assuming that it was, the *Cogburn* factors weighed in favor of a finding that the RO had implicitly denied a claim for TDIU before the November 2000 Board decision.[17] As to the first finding, the Board stated that the 1999 application for TDIU was not predicated solely on migraines, but on migraines, urinary tract infections, and gastroesophageal reflux disease.[18] The Board also stated that the RO addressed the issue of TDIU in an April 1999 rating decision,[19] and that subsequent statements filed between this decision and the November 2000 Board decision

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[15] R. at 13-14.

[16] *Id.*

[17] R. at 16.

[18] *Id.*

[19] Appellant calls this rating decision the "March 1999" rating decision, as it was decided on March 24, 1999. But the Board calls the rating decision the "April 1999" rating decision, as the date stamp on the document is "April 1, 1999." The Court is satisfied that the documents are one and the same.

did not re-raise entitlement to TDIU.[20] Regarding the implicit denial issue, the Board determined that even if TDIU were bifurcated under the above analysis, it was implicitly denied because "[t]he Board, by denying the increased evaluation for migraines, on a schedular and extraschedular basis, also implicitly denied any higher ratings."[21]

After reviewing the parties' arguments, relevant law, and the record of proceedings, the Court finds that the Board provided adequate reasons or bases to facilitate judicial review, and it did not clearly err in the decision on appeal. Contrary to appellant's arguments that the Board decision on appeal failed to discuss whether her May 1999 statement and June 1999 exam detailing increased migraine activity constituted new and material evidence under § 3.156(b), the Board decision addressed that evidence of record and determined that "statements after the April 1999 rating decision and before the November 2000 Board decision do not re [-]raise the issue of TDIU."[22] This analysis is explicit enough to comply with the Federal Circuit's precedent in *Beraud* and *Bond*.[23] Appellant's arguments amount to disagreements with how the Board weighed the evidence, and absent clear error, it is not within the Court's purview to reweigh the evidence.[24]

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[20] R. at 16.

[21] R. at 17.

[22] R. at 16.

[23] *Beraud*, 766 F.3d at 1406-07; *Bond*, 659 F.3d at 1368.

[24] *Owens v. Brown*, 7 Vet.App. 429, 433 (1995).

Relatedly, the Court finds unpersuasive appellant's argument that the Board decision on appeal provided inadequate reasons or bases for its decision to adjudicate whether TDIU was implicitly denied. Appellant asserts that the November 2000 Board lacked jurisdiction over the TDIU issue.[25] The Board found that TDIU was finally adjudicated in April 1999 and was not re-raised by the later filed documents. As for the documents appellant relied on, the Secretary correctly notes that appellant never asserted that she was unemployable due solely to the migraine symptomatology detailed in May 1999 and June 1999. The Board thus did not err in finding that "[w]hile the Veteran continued to argue about some of the ratings assigned, she never specifically indicated that her migraines were so severe they rendered her unable to secure or follow a substantially gainful occupation." Thus, despite appellant's reasons-or-bases arguments and the merits arguments that follow, the Board made the requisite determinations necessary for it to determine jurisdiction, and the Court does not detect clear error.

Lastly, on appellant's argument in the alternative that the Board did not appropriately address the *Cogburn* factors in its implicit denial analysis, the Board noted that "the award of a disability rating less than 100[%] generally provides notice as to how the Secretary has rated a claimant's condition and serves as a final decision"; that a request for entitlement to TDIU is a form of an increased rating claim; and that "by

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[25] *See* Appellant's Br. at 17.

denying the increased evaluation for migraines, on a schedular and extraschedular basis," the November 2000 Board decision "also implicitly denied any higher ratings."[26] Contrary to appellant's argument, this explanation provides sufficient discussion under *Locklear* to analyze a non-bifurcated claim. Thus, appellant has not met her burden of proving prejudicial error on appeal, and the Court will affirm the Board's decision.[27]

II. CONCLUSION

After reviewing the parties' arguments and the record of proceedings, the Court AFFIRMS the Board's February 25, 2020, decision. The Court DISMISSES the appeal of that part of the Board's decision denying a rating above 50% for a migraine disability.

DATED: October 26, 2021

Copies to:

Sean A. Ravin, Esq.

VA General Counsel (027)

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[26] R. at 17.

[27] *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that the appellant bears the burden of proving error on appeal), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

[SEAL] **BOARD OF VETERANS' APPEALS**
FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF [redacted]
SOLENA Y. HAMPTON Docket No. 05-11 100
Represented by
Sean A. Ravin, Attorney

DATE: February 25, 2020

ORDER

Entitlement to a disability rating in excess of 50 percent for a migraine disability is denied.

Entitlement to an effective date prior to September 8, 2003 for entitlement to a total disability rating based on individual unemployability due to service-connected disabilities (TDIU) is denied.

Entitlement to an effective date prior to September 8, 2003 for entitlement to Dependents' Educational Assistance (DEA) is denied.

FINDINGS OF FACT

1. The symptoms of the Veteran's migraine disability are contemplated by the schedular rating criteria.

2. The November 2000 Board decision became final.

3. The Veteran submitted an application for entitlement to a TDIU on September 8, 2003.

CONCLUSIONS OF LAW

1. The criteria for an extraschedular rating in excess of 50 percent for a migraine have not been met. 38 U.S.C. § 1155 (2012); 38 C.F.R. § 4.124a, Diagnostic Code 8100 (2017).

2. The criteria for an effective date prior to September 8, 2003 for the grant of entitlement to a TDIU have not been met. 38 U.S.C. §§ 5101(a), 5110 (2012); 38 C.F.R. §§ 3.155, 3.156, 3.157, 3.159, 3.321, 3.341, 3.400, 4.16 (2017).

3. The criteria for an effective date prior to September 8, 2003 for the grant of entitlement to DEA benefits have not been met. 38 U.S.C. §§ 5101(a), 5110 (2012); 38 C.F.R. §§ 3.155, 3.156 (2017).

REASONS AND BASES FOR FINDINGS AND CONCAWADRLUSIONS

The Veteran served on active duty from June 1985 to November 1989.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from an April 2004 and May 2015 rating decisions of a Regional Office (RO) of the Department of Veterans Affairs (VA).

In June 2007 the Board issued a decision adjudicating the entitlement to disability rating in excess of 30 percent for service-connected migraine headaches and entitlement to a TDIU. The Board denied entitlement to a TDIU and granted a 50 percent disability rating for

migraine headaches, the maximum schedular rating for that condition.

The Veteran appealed that decision to the United States Court of Appeals for Veterans Claims (CAVC). In March 2009 the Court granted a Joint Motion for Partial Remand, which vacated those parts of the Board's June 2007 decision which denied a disability rating in excess of 50 percent for migraine headaches and denied a TDIU. These issues were then remanded to the Board for compliance with the instructions designated therein. The case was returned to Board in June 2010, at which time it was again remanded for additional development. In March 2015, the Board issued a decision awarding entitlement to a TDIU prior to September 5, 2007 and remanding the issue of entitlement to an extraschedular evaluation in excess of 50 percent for headaches for further development. The required development has been completed and this case is appropriately before the Board. See *Stegall v. West*, 11 Vet. App. 268 (1998).

In May 2015, the RO issued a decision awarding entitlement to TDIU and DEA from September 8, 2003. The Veteran filed a Notice of Disagreement for the May 2015 rating decision and argued that the award of TDIU and DEA should be prior to September 8, 2003. The Veteran perfected an appeal of those issues to the Board and they have been certified to the Board for review, and they are ripe for adjudication by the Board.

In December 2014, a medical expert witness testified before the undersigned Veterans Law Judge. The

Veteran was not present at the hearing and did not testify. A transcript of this hearing has been associated with the claims file.

1. Entitlement to a disability rating in excess of 50 percent for a migraine disability

The Veteran's headache disorder is currently rated as 50 percent disabling under Diagnostic Code 8100. The Veteran seeks extraschedular consideration for his migraine headaches.

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

Under Diagnostic Code 8100, a 10 percent rating is assigned for migraine headaches when a veteran has characteristic prostrating attacks averaging once in two months over the last several months. A 30 percent rating is assigned for migraine headaches when a veteran has characteristic prostrating attacks averaging once per month over the last several months. A 50 percent rating is assigned for migraine headaches when a Veteran has very frequent, completely prostrating headaches with prolonged attacks that are

productive of severe economic inadaptability. 38 C.F.R. § 4.124a.

The Veteran attended a VA examination in September 2013. At the September 2013 VA examination, the Veteran reported that her headaches were about the same as they were during her previous VA examination performed in March 2010. She discontinued the use of Maxalt and reported that migraine medications did not work for her, but she took NSAIDs as needed for headache pain. The examiner also reported that the Veteran takes etolodac, an anti-inflammatory drug, for her migraines. The Veteran described her headaches as usually starting on the right side of the face and moving left. Her headaches typically last one to two days. The Veteran also reported symptoms of sensitivity to light. Migraines were reported to happen three times per months and last two days. There were no prostrating migraine or non-migraine headaches reported. The functional impact of the headaches depended on the severity, frequency, and duration of the headaches. The Veteran reported that she last worked in 2005 but she started getting headaches and feeling bad and reported that she was "let go" from her job.

The Veteran also attended a VA General Medical Examination in March 2010. In the March 2010 examination, the Veteran reported having migraine headaches on the left or right side of her head and that she experiences them twice per month. She also reported that she experiences them two to three times per month and that most of her headaches were prostrating and lasted for hours. She reported taking Tramadol as

needed. She also reported seeing bright spots when she experiences a migraine, and that she usually sleeps most of the day until the headache goes away. She reported that if the medication she takes did not work she would receive an injection to treat her headaches, but she did not recall the last time she received an injection as it has become less frequent. The March 2010 VA examiner noted that although her migraines caused increased absenteeism and severe effects on usual daily activities, they did not render her unemployable for heavy duty or sedentary employment.

In a January 2004 VA examination, the Veteran reported migraine headaches progressing to the point that they occur daily. She reported receiving varying diagnoses of vascular headaches with a tension component, migraine headaches, and a daily headache disorder with biweekly migraine attacks which last several hours to a day. The Veteran reported nausea and vomiting, as well as light and sound sensitivity, associated with her headaches. Her headaches were described as a pounding sensation that primarily involve the left side of her head. Her reported that her headaches become a dull ache that become generalized and that they are severe and pounding twice per week. She reported that pain from her head radiates down her neck and causes pain, as well as developing tingling in her arms and legs due to headaches. She reported treating her headaches with several medications, and that, with treatment, her headache becomes "bearable." She reported that stress plays a large role in her headaches and that she is sensitive to light and noise. She

reported being treated with traction for her neck pain and medication. She further reported missing a lot of school due to headaches, and that her headaches make it difficult to concentrate and remember important factors in her life. The Veteran described her headaches as incapacitating and that they require that she lays down for at least one to two days. The VA examiner opined that severe headaches occur at biweekly intervals but that they do not preclude employment.

In June 2004, the Veteran submitted a statement describing her migraines as lasting two to three days and that she has nausea, vomiting, and vision problems associated with the migraines, as well as trouble concentrating and remembering.

VA treatment reports reflect consistent reports of headaches and migraines. The Veteran also reported symptoms of weakness with her headaches. In January 2014 the Veteran sought treatment at an emergency room for her headaches. A CT scan and EKG were normal and, after treatment with IV medication, her headache was almost completely resolved. She was given a prescription for medication and instructions to follow up with her primary care doctor. An October 2018 neurology evaluation indicated that sinusitis may contribute to her headaches.

At the December 2014 hearing, Dr. E.T. testified that she interviewed the Veteran for more than an hour and that the Veteran reported problems with concentration, motivation, and depression related to her headaches and that she had two to three headaches per

week which could last for several days at a time. Dr. E.T. further testified that the severity of the Veteran's headaches caused marked interference in employment. She further testified that the Veteran reported feeling nausea and fatigue as a result of medications she is taking for her migraines.

Dr. E.T. also provided a report in November 2014 which states that, as a result of her migraine headaches, which occur on a frequent basis, the Veteran has difficulty with concentration, motivation and depression. The Veteran reported that she has two to three headaches per week which can last up to several days at a time. Dr. E.T. also reported that the Veteran was "incapacitated" one to two days per week due to her migraines.

The claims file indicates that records were requested from the Social Security Administration were requested as a December 2006 document indicates that the Veteran applied for benefits from the Social Security Administration, but an August 2010 document from the Social Security Administration indicates that there was no medical evidence on file with that agency. Further, the November 2014 report from Dr. E.T. indicates that the Veteran did not receive Social Security Disability benefits.

The Board notes that the Veteran currently has the highest schedular rating available for this disability. There are no other diagnostic codes that are applicable. See *Butts v. Brown*, 5 Vet. App. 532, 538 (1993). Because the Veteran is at the maximum schedular rating

for headaches, there is no legal basis upon which to award a higher schedular rating. See *Sabonis v. Brown*, 6 Vet. App. 426, 430 (1994). Therefore, the schedular component of the Veteran's increased rating claim must be denied.

In July 2019, the Director of Compensation Service determined that entitlement to an increased rating on an extraschedular basis for migraine headaches was not established. The Director of Compensation Service noted that the Veteran reported symptoms of pain and light sensitivity and were reported to include difficulty concentrating, lack of motivation, depression, and unspecified visual disturbances. The Director of Compensation Service noted that while this symptomology was not explicitly listed in the rating schedule, it is considered to be contemplated under the rating criteria of DC 8100 as these symptoms would fall under the criterion of "characteristic prostrating attacks" or "productive of severe economic inadaptability," which is required for a 50 percent rating.

The Board finds that an extraschedular rating in excess of 50 percent for the Veteran's headaches is not warranted, as the Veteran's symptoms are contemplated by the schedular rating criteria.

In exceptional cases, an extraschedular rating may be provided. 38 C.F.R. § 3.321. The threshold factor for extraschedular consideration is a finding that the evidence before VA presents such an exceptional disability picture that the available schedular evaluations for the service-connected disability are inadequate.

Therefore, initially, there must be a comparison between the level of severity and symptomatology of the Veteran's service-connected disability with the established criteria found in the rating schedule for that disability. *Thun v. Peake*, 22 Vet. App. 111 (2008). If the criteria reasonably describe the Veteran's disability level and symptomatology, then the Veteran's disability picture is contemplated by the rating schedule and no referral is required.

In the second step of the inquiry, however, if the schedular evaluation does not contemplate a Veteran's level of disability and symptomatology and is found inadequate, it must determine whether the Veteran's exceptional disability picture exhibits other related factors such as those provided by the regulation as "governing norms." 38 C.F.R. § 3.321 (b)(1) (related factors include "marked interference with employment" and "frequent periods of hospitalization").

When the rating schedule is inadequate to evaluate a Veteran's disability picture and that picture has related factors such as marked interference with employment or frequent periods of hospitalization, then the case must be referred to the Under Secretary for Benefits or the Director of the Compensation and Pension Service for completion of the third step, a determination of whether, to accord justice, the Veteran's disability picture requires the assignment of an extraschedular rating. The Board notes it has jurisdiction to review the entirety of the Director's decision denying or assigning an extraschedular rating and the Board is authorized to assign an extraschedular rating

when appropriate. *Kuppamala v. McDonald*, 27 Vet. App. 447, 456-57 (2015). Although the Board is required to obtain the Compensation Service Director's decision before awarding extraschedular TDIU benefits in the first instance, see *Bowling*, 15 Vet. App. at 10, the Board is not bound by the Director's decision or otherwise limited in its scope of review that determination. *Wages v. McDonald*, 27 Vet. App. 233, 236-38 (2015) (citing 38 U.S.C. §§ 511(a), 7104(a); 38 C.F.R. § 4.16(b)).

The Board finds that, while the Veteran's reported symptoms, including pain and light sensitivity, difficulty concentrating, lack of motivation, depression, and unspecified visual disturbances, may cause economic impairment, the schedular rating criteria specifically provides for ratings based both on the severity of the headache episodes themselves as well as the level of resulting economic impairment. Specifically, Diagnostic Code 8100 provides specific ratings based on the frequency and duration of prostrating attacks, and economic inadaptability due to headaches and related attacks. Thus, symptoms such as the headache, light sensitivity, visual disturbances, and pain are specifically included in the disability rating analysis as to whether the migraines are prostrating and/or cause economic inadaptability contemplated. Furthermore, to the extent to which the difficulty concentrating, lack of motivation and depression cause economic impairment, the 50 percent rating under Diagnostic Code 8100 requires that headache symptoms cause severe economic inadaptability. Therefore, the Board finds

that the Veteran does not have any symptoms or impairment from the service-connected headache disability that are unusual or are different from those contemplated by the schedular rating criteria. The schedule is intended to compensate for average impairments in earning capacity resulting from service-connected disability in civil occupations. 38 U.S.C. § 1155. "Generally, the degrees of disability specified [in the rating schedule] are considered adequate to compensate for considerable loss of working time from exacerbations or illnesses proportionate to the severity of the several grades of disability." 38 C.F.R. § 4.1 (2018). In this case, the problems reported by the Veteran are specifically contemplated by the schedular rating criteria discussed above.

In conclusion, the preponderance of the evidence is against a disability rating in excess of 50 percent thereafter on any basis for a migraine headache disability. As a preponderance of the evidence is against the award of a higher rating, the benefit of the doubt doctrine is not applicable in the instant appeal. See 38 U.S. C. § 5107(b); 38 C.F.R. §§ 4.3, 4.7.

2. Entitlement to an effective date prior to September 8, 2003 for entitlement to a TDIU.

3. Entitlement to an effective date prior to September 8, 2003 for entitlement to DEA benefits.

The Veteran is currently entitled to a TDIU and DEA benefits effective September 8, 2003. As entitlement to

DEA benefits is derived from an award of a total rating, these benefits share the same effective date.

The Veteran contends that an effective date earlier than September 8, 2003 is warranted for the grant of a TDIU and Dependents' Educational Assistance (DEA) benefits. She asserts that an effective date of May 1, 1997 is warranted, the effective date of the grant of service connection for migraines. The Veteran further argues that as she previously filed a Notice of Disagreement with her disability rating for migraines, she also had a pending claim with entitlement to a TDIU pursuant to which was not adjudicated.

With respect to an earlier effective date, a TDIU is a form of increased rating claim, and, therefore, the effective date rules for increased compensation claims apply. See *Norris v. West*, 12 Vet. App. 413, 420 (1999); *Hurd v. West*, 13 Vet. App. 449 (2000). The effective date shall be the later of either the date of receipt of claim, or the date entitlement arose. 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400(o). An effective date for a claim for increase may also be granted prior to the date of claim if it is factually ascertainable that an increase in disability had occurred within one year from the date of claim. 38 U.S.C. § 5110(b)(2); 38 C.F.R. §§ 3.400(o)(1), (2). Therefore, the ultimate question in determining the effective date for TDIU is when it was factually ascertainable that the service-connected disabilities rendered a veteran unemployable.

Here, the Veteran was awarded service-connection for migraines effective May 1, 1997. In October 1997 she

filed a claim for an increased rating, and in September 1998, the Veteran was granted a disability rating of 30 percent effective May 1, 1997. The Veteran did not file a Notice of Disagreement with the September 1998 rating decision, and, as such, that decision became final.

In February 1999, the Veteran filed an application for entitlement to a TDIU, which was denied in a March 1999 rating decision. The Veteran did not appeal the March 1999 rating decision and it became final. 38 C.F.R. § 20.1103.

In May 1999, the Veteran filed an application for an increased disability rating for her service-connected disabilities which was denied in a June 1999 rating decision. The June 1999 decision was appealed to the Board of Veterans Appeals. In a November 2000 decision, the Board denied entitlement to an increased rating for the Veteran's service-connected migraine disability. The November 2000 Board decision was not appealed, and, as such, became final. 38 C.F.R. § 20.1100.

The United States Court of Appeals for the Federal Circuit (Federal Circuit) has made it clear that an appellant generally can attempt to overcome the finality of a prior final decision of the RO or Board in only one of two ways: by a request for revision of an RO or Board decision based on clear and unmistakable error (CUE), or by a claim to reopen based upon new and material evidence. See *Cook v. Principi*, 318 F.3d 1334, 1339 (Fed. Cir. 2002) (en banc); see also 38 U.S.C. § 7111(a)

("A decision by the Board is subject to revision on the grounds of [CUE]. If evidence establishes the error, the prior decision shall be reversed or revised.").

Of the two options for challenging a final decision, only a request for revision premised on CUE could result in the assignment of an earlier effective date for an award of service connection, because the proper effective date for an award based on a claim to reopen can be no earlier than the date on which that claim was received. 38 U.S.C.§ 5110(a); see *Leonard v. Nicholson*, 405 F.3d 1333, 1337 (Fed. Cir. 2005) ("[A]bsent a showing of CUE, [the appellant] cannot receive disability payments for a time frame earlier than the application date of his claim to reopen, even with new evidence supporting an earlier disability date."); *Rudd v. Nicholson*, 20 Vet. App. 296, 300 (2006) (holding that once a decision is final, a freestanding claim for an effective date earlier than the date on which the claim was received impermissibly attempts to vitiate the rule of finality); see also *Bingham v. Nicholson*, 421 F.3d 1346, 1349 (Fed. Cir. 2005) (holding that failure to consider all possible theories that may support a claim does not serve to vitiate the finality of a decision).

The Veteran next filed an application for TDIU on September 8, 2003. Entitlement to a TDIU was denied in an April 2004 rating decision. The April 2004 rating decision was appealed and remained on appeal until a March 2015 Board decision granted entitlement to a TDIU. In May 2015, the RO issued a decision granting entitlement to a TDIU effective September 8, 2003, the

date of the receipt of the application for entitlement to a TDIU.

The Veteran has argued that since the November 2000 Board decision did not explicitly address her claim for entitlement to a TDIU, that claim is still pending. The United States Court of Appeals for the Federal Circuit (Federal Circuit) has held if VA fails to adjudicate a claim, whether formal or informal, and fails to notify the claimant of the denial, that claim remains pending until it is finally adjudicated. See *Adams v. Shinseki*, 568 F.3d 956, 960 (Fed. Cir. 2009); *Cook v. Principi*, 318 F.3d 1334, 1340 (Fed. Cir. 2002) (en banc).

The Federal Circuit subsequently held that when a claimant files more than one claim at the same time, if the agency of original jurisdiction (AOJ) acts on one of the claims but fails to specifically address the other, the second claim is deemed denied and the appeal period begins to run. *Deshotel v. Nicholson*, 457 F.3d 1258, 1261 (Fed. Cir. 2006).

The United States Court of Appeals for Veterans Claims (Court), for its part, has held that, for a claim to be deemed denied, there must be a recognition of the substance of the claim in a decision from which the claimant could reasonably deduce that the claim had been adjudicated, or an explicit subsequent adjudication of a claim for the same disability. *Ingram v. Nicholson*, 21 Vet. App. 232, 255 (2007). In Ingram, the Court interpreted Deshotel and Adams to stand for the proposition that, where a rating decision discusses a claim in terms sufficient to put the claimant on notice

that it was being considered and rejected, then it constitutes a denial of that claim even if the formal adjudicative language does not "specifically" deny that claim. Id. The key question in the implicit denial inquiry is whether it would be clear to a reasonable person that VA's action that expressly refers to one claim is intended to dispose of others as well. *Adams*, 568 F.3d at 962-963.

Later, in *Cogburn v. Shinseki*, 24 Vet. App. 205 (2010), the Court enumerated four factors that must be considered when determining whether a claim was implicitly denied: (1) "The relatedness of the claims"; (2) "whether the adjudication alluded to the pending claim in such a way that it could reasonably be inferred that the prior claim was denied"; (3) "the timing of the claims"; and (4) whether "the claimant is represented." Id. at 212-14.

In determining whether a veteran's claim was previously adjudicated, the key question is whether sufficient notice was provided to the veteran that would allow him to reasonably understand that he would not be awarded benefits for the disability asserted in his pending claim and thus decide for himself whether to accept the decision or seek redress elsewhere. *Jones v. Shinseki*, 619 F.3d 1368, 1373 (Fed. Cir. 2010), 568 F.3d at 965 ("[T]he implicit denial rule is, at bottom, a notice provision.").

The Board finds that TDIU was not part of the prior claim and even assuming it was that the Cogburn factors weigh in favor of a finding of implicit denial of the

implicit claim for a TDIU, had it existed, by the November 2000 Board decision. In *Rice v. Shinseki*, 22 Vet. App. 447 (2009), the Court held that a claim for a TDIU is part of a rating claim when unemployability is raised during the course of the appeal. As the November 2000 Board decision predated the Rice decision it did not explicitly address TDIU as decisions subsequent to Rice have done. The Board further notes this case is distinguishable from Rice. Specifically, the 1999 application for TDIU was predicated on several service-connected disabilities (listed on the application as migraines, GERD, bladder which corresponded to the Veteran's three service-connected disabilities of migraine headaches, urinary tract infections and GERD). Additionally, the Board notes that the issue of TDIU was addressed in an April 1999 rating decision and as the Veteran's representative has noted, this rating decision was unappealed. Furthermore, statements after the April 1999 rating decision and before the November 2000 Board decision do not reraise the issue of TDIU. While the Veteran continued to argue about some of the ratings assigned, she never specifically indicated that her migraines were so severe they rendered her unable to secure or follow a substantially gainful occupation. TDIU "claims" can be bifurcated in VA adjudication. See *Locklear v. Shinseki*, 24 Vet. App. 311 (2011). Given the facts above, including that the initial claim was TDIU based upon all of the service-connected disabilities, the claim for TDIU was denied in a rating decision which was not appealed, and the record does not reflect that TDIU was reraised after

the rating decision in connection with the claimed migraines, the Board finds the claim was bifurcated.

Furthermore, to the extent to which the Veteran argues the claim was not bifurcated, and was part of the prior claim for migraines, the Board finds that even if the claim was not bifurcated it was implicitly denied. Specifically, the award of a disability rating less than 100 percent generally provides notice as to how the Secretary has rated a claimant's condition and serves as a final decision, if unappealed, with regard to entitlement to any higher disability rating associated with the underlying disability. See *Locklear v. Shinseki*, 24 Vet. App. 311, 316 (2011), *citing Ingram*, 21 Vet. App. at 248)). As noted above a TDIU is a form of increased rating claim. See *Norris v. West*, 12 Vet. App. 413, 420 (1999); *Hurd v. West*, 13 Vet. App. 449 (2000). The Board, by denying the increased evaluation for migraines, on a schedular and extraschedular basis, also implicitly denied any higher ratings.

Accordingly, as the Veteran did not seek to revise the November 2000 Board decision based on CUE or filing a motion for reconsideration and did not otherwise seek to appeal the decision to CAVC, the November 2000 Board decision became final.

Thus, the appropriate effective date for entitlement to a TDIU is September 2003, and the Veteran's

claim for an effective date prior to September 8, 2003 is denied.

/s/ H. Seesel
H. SEESEL
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board A. Boal, Associate Counsel

NOTE: This order is nonprecedential.

United States Court of Appeals
for the Federal Circuit

SOLENA Y. HAMPTON,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2022-1359

Appeal from the United States Court of Appeals for Veterans Claims in No. 20-4075, Judge Scott Laurer.

ON PETITION FOR REHEARING EN BANC

(Filed Aug. 21, 2023)

Before MOORE, *Chief Judge*, NEWMAN, LOURIE, CLEVENGER[1], DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and STARK, *Circuit Judges*.

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[1] Circuit Judge Clevenger participated only in the decision on the petition for panel rehearing.

PER CURIAM.

ORDER

Solena Y. Hampton filed a petition for rehearing en banc. The petition was first referred as a petition to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue August 28, 2023.

FOR THE COURT

August 21, 2023
Date

/s/ Jarrett B. Perlow
Jarrett B. Perlow
Clerk of Court