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

IN THE APPEAL OF
DARALD G. BLY

[redacted]

DOCKET NO. 12-22 995) DATE *November 24, 2014*
) *SDM*
)

On appeal from the
Department of Veterans Affairs Regional Office in
Sioux Falls, South Dakota

THE ISSUE

Whether new and material evidence has been presented to reopen a claim for service connection for bilateral hearing loss, and, if so, whether service connection is warranted.

REPRESENTATION

Appellant represented by: Disabled American Veterans

WITNESS AT HEARING ON APPEAL

Appellant

ATTORNEY FOR THE BOARD

Jonathan Tracy, Associate Counsel

INTRODUCTION

The Veteran served on active duty from May 1960 to November 1960 and January 1962 to January 1965.

This matter came before the Board of Veterans' Appeals (the Board) on appeal from a January 2012 rating decision of the Sioux Falls, South Dakota, Department of Veterans Affairs (VA) Regional Office (RO).

The Veteran testified before the undersigned Veterans Law Judge at a June 2013 hearing. A transcript of the hearing is associated with the claims file.

In June 2013, the Board received new, pertinent evidence from the appellant's representative, accompanied by a waiver of review by the agency of original jurisdiction. 38 C.F.R. § 20.1304 (2013).

The Board notes that the Veteran's claim for service connection for bilateral hearing loss was previously denied in a January 2004 rating decision. That decision was not appealed to the Board and became final. The Veteran filed to reopen the claim in November 2011. The Board is required to address the issue of whether the Veteran submitted new and material evidence regardless of the RO's findings. *See Jackson v. Principi*, 265 F.3d 1366 (Fed. Cir. 2001); *Barnett v. Brown*, 83 F.3d 1380, 1383-84 (Fed. Cir. 1996). Only where the Board concludes that new and material evidence has been received does it have jurisdiction to consider the merits of the claim. *Id*. As such, the issue has been captioned as set forth above.

FINDINGS OF FACT

1. In a January 2004 decision, the RO denied the Veteran's claims for service connection for bilateral hearing loss. The Veteran did not file a timely appeal.

2. The evidence received since the January 2004 RO decision regarding the Veteran's claim for service connection for bilateral hearing loss is not cumulative of the evidence previously considered, contributes to a more complete picture of the Veteran's claim, and creates a reasonable possibility of an allowance of his claim.

3. The preponderance of evidence reflects bilateral hearing loss was not manifested during the Veteran's active duty service or for many years thereafter, nor is bilateral hearing loss otherwise related to such service.

CONCLUSIONS OF LAW

1. The claim for service connection for bilateral hearing loss has been reopened. 38 U.S.C.A. §§ 5108, 7105 (West 2002 & Supp. 2013); 38 C.F.R. § 3.156, (2014).

2. The criteria for service connection for bilateral hearing loss have not been met. 38 U.S.C.A. §§ 1110, 1112, 1154, 3103, 5103A, 5107 (West 2002 & Supp. 2013); 38 C.F.R. §§ 3.303, 3.304, 3.307, 3.309, 3.385 (2014).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Board has thoroughly reviewed all the evidence in the Veteran's claims folder. Although the Board has an obligation to provide reasons and bases supporting this decision, there is no need to discuss, in detail, the extensive evidence submitted by the Veteran or on his behalf. *See Gonzales v. West*, 218 F.3d 1378, 1380-81 (Fed. Cir. 2000). The analysis below focuses on the most salient and relevant evidence and on what this evidence shows, or fails to show, on the claim. The Veteran must

not assume that the Board has overlooked pieces of evidence that are not explicitly discussed herein. *See Timberlake v. Gober*, 14 Vet. App. 122 (2000).

I. Duties to Notify and Assist

VA has duties to notify and assist claimants in substantiating a claim for VA benefits. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126; 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.326(a). Upon receipt of a complete or substantially complete application for benefits, VA is required to notify the claimant and his or her representative of any information, and any medical or lay evidence, that is necessary to substantiate the claim. 38 U.S.C.A. § 5103(a); 38 C.F.R. § 3.159(b); *Quartuccio v. Principi*, 16 Vet. App. 183 (2002). The notice must inform the claimant of any information and evidence not of record (1) that is necessary to substantiate the claim; (2) that VA will seek to provide; and (3) that the claimant is expected to provide. Notice should be provided to the claimant before the initial unfavorable adjudication of the claim. *Pelegrini v. Principi*, 18 Vet. App. 112 (2004).

In addition, the notice requirement applies to all five elements of a service-connection claim, including: (1) veteran status; (2) existence of a disability; (3) a connection between the veteran's service and the disability; (4) degree of disability; and (5) effective date of the disability. *See Dingess v. Nicholson*, 19 Vet. App. 473 (2006).

In a new and material evidence claim, the notice must include the evidence and information that is necessary to reopen the claim and the evidence and information that is necessary to establish the underlying claim for the benefit sought. *Kent v. Nicholson*, 20 Vet. App. 1 (2006). The RO provided a letter dated in November 2011 that adequately fulfilled notification requirements established by *Kent*. With respect to the *Dingess* requirements, the November 2011 letter included notice of what type of information and evidence was needed to establish a disability rating, as well as notice of the type of evidence necessary to establish an effective date.

The RO provided the Veteran notice by the letter dated in November 2011 that provided the requirements for establishing service connection and complied with the requirements of 38 U.S.C.A. § 5103(a) and 38 C.F.R. § 3.159(b).

VA is also required to make reasonable efforts to help a claimant obtain evidence necessary to substantiate a claim. 38 U.S.C.A. § 5103A; 38 C.F.R. § 3.159(c). This "duty to assist" contemplates that VA will help a claimant obtain records relevant to a claim, whether or not the records are in Federal custody, and that VA will provide a medical examination or obtain an opinion when necessary to make a decision on the claim. 38 C.F.R. § 3.159(c)(4).

In this instance, the claims file contains the Veteran's service treatment records, VA treatment records, private medical records and an opinion, and the Veteran's own assertions in support of his claim. The Board has reviewed the file for references to additional treatment reports not of record, but has found nothing to suggest that there is any outstanding evidence with respect to the Veteran's claims for which VA has a duty to obtain; therefore appellate review may proceed without prejudicing him. *See Bernard v. Brown*, 4 Vet. App. 384 (1993).

In addition, the RO arranged for VA medical opinion in August 2012. Prior to the January 2004 rating decision, the Veteran received a VA audiology examination that diagnosed bilateral hearing loss. The Board finds that the opinion obtained in August 2012 was adequate, as it provides findings relevant to the Veteran's conditions and history. *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295 (2008). The examiner noted that the claims file, including the medical records, was reviewed. The examiner also considered the Veteran's full history.

Hence, no further notice or assistance to the Veteran is required to fulfill VA's duty to assist him in the development of the claim. *Smith v. Gober*, 14 Vet. App. 227 (2000), *aff'd* 281 F.3d 1384 (Fed. Cir. 2002); *Dela Cruz v. Principi*, 15 Vet. App. 143 (2001); *see also Quartuccio v. Principi*, 16 Vet. App. 183 (2002).

II. New and Material Evidence

Unappealed rating actions of the RO are final. 38 U.S.C.A. § 7105. In order to reopen a claim there must be added to the record "new and material evidence." 38 U.S.C.A. § 5108.

New and material evidence must be secured or presented since the time that the claim was finally disallowed on any basis, not only since the time the claim was last disallowed on the merits. *Evans v. Brown*, 9 Vet. App. 273, 285 (1996). A claim becomes final and subject to a motion to reopen only after the appeal period has run; interim submissions before finality must be considered as part of the original claim pursuant to 38 C.F.R. § 3.156(b). *Jennings v. Mansfield*, 509 F.3d 1362 (Fed. Cir. 2007).

The threshold for determining whether new and material evidence raises a reasonable possibility of substantiating a claim is "low." When evaluating the materiality of newly submitted evidence, the focus must not be solely on whether the evidence remedies the principal reason for denial in the last prior decision; rather the determination of materiality should focus on whether the evidence, taken together, could at least trigger the duty to assist or consideration of a new theory of entitlement. *Shade v. Shinseki*, 24 Vet. App. 110, 117 (2010).

The appellant did not appeal the January 2004 rating decision that denied the claim for service connection for bilateral hearing loss or submit any additional evidence during the appeal period. That decision was the last time the appellant's claim was finally disallowed on any basis. *See Glynn v. Brown*, 6 Vet. App. 523 (1994). Thus, the January 2004 rating decision is final. 38 C.F.R. § 20.1100.

The pertinent regulations require that evidence raise a reasonable possibility of substantiating a claim in order to be considered "new and material," and define material evidence as evidence, that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. 38 C.F.R. § 3.156(a).

The credibility of the evidence is presumed for the purpose of reopening. *Justus v. Principi*, 3 Vet. App. 510 (1992). Whether new and material evidence is submitted is also a jurisdictional test – if such evidence is not submitted, then the claim cannot be reopened. *Barnett v. Brown*, 83 F.3d 1380, 1383-84 (Fed. Cir. 1996). Proper analysis of the question requires a determination of whether the claim should be reopened and, if so, an adjudication on the merits after compliance with the duty to assist.

The evidence of record as of the January 2004 RO decision included a VA examination, the Veteran's service treatment records, and post-service treatment records. The RO denied the claim because the Veteran's bilateral hearing loss was not related to active duty service.

Evidence received since the January 2004 RO decision includes a VA audiology opinion and a private medical opinion.

The Board finds that the private opinion is new evidence, as it is not cumulative or redundant and was not previously considered. The opinion is also material because it relates to an unestablished fact and supports the Veteran's claim for service connection. The threshold for determining whether new and material evidence raises a reasonable possibility of substantiating a claim is low; the Board finds that the threshold is met and that VA's duty to assist is triggered.

As new and material evidence has been received, reopening of the claims for entitlement to service connection for bilateral hearing loss is warranted.

The Board must next consider whether the claimant has been given an opportunity to present argument and/or additional evidence on this matter before the RO, and whether adjudication by the Board will violate the prejudice safeguard set forth in *Bernard v. Brown*, 4 Vet. App. 384 (1993). The Board finds that, in the present case, there is no prejudice to the Veteran in proceeding to the merits of his claim. The Veteran was advised in the November 2011 notice of what evidence was needed to substantiate the underlying claim for service connection. The Veteran was given ample time to respond and present argument and evidence in support of

his claim. Thus he has been provided with adequate notice and opportunity to present argument and/or additional evidence on this matter. Also, the VA provided a medical opinion in August 2012. Therefore, there is no prejudice to the Veteran in proceeding to the merits of his claim.

III. Service Connection Criteria

Service connection may be granted if the evidence demonstrates that a current disability resulted from an injury or disease incurred or aggravated in active military service. 38 U.S.C.A. § 1110; 38 C.F.R. § 3.303(a). Establishing service connection generally requires medical evidence or, in certain circumstances, lay evidence of the following: (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease and the present disability. *See Davidson v. Shinseki*, 581 F.3d 1313 (Fed. Cir. 2009); *Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007); *Hickson v. West*, 12 Vet. App. 247 (1999); *Caluza v. Brown*, 7 Vet. App. 498 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

For some "chronic diseases," presumptive service connection is available. 38 U.S.C.A. §§ 1101, 1112, 1113, 1137; 38 C.F.R. §§ 3.307, 3.309. With "chronic disease" shown as such in service (or within the presumptive period under § 3.307), so as to permit a finding of service connection, subsequent manifestations of the same chronic disease at any later date, however remote, are service connected, unless clearly attributable to intercurrent causes. 38 C.F.R. § 3.303(b).

For the showing of a "chronic disease" in service there is required a combination of manifestations sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time. 38 C.F.R. § 3.303(b). If chronicity in service is not established, a showing of continuity of symptoms after discharge is required to support the claim. *Id*. If not manifest during service, where a Veteran served continuously for 90 days or more during a period of war, or during peacetime service after December 31, 1946, and the 'chronic disease' became manifest to a degree of 10 percent within 1 year from date of termination of such service, such disease shall be presumed to have been incurred in service, even though there is no

evidence of such disease during the period of service. 38 C.F.R. § 3.307. The term "chronic disease", whether as shown during service or manifest to a compensable degree within a presumptive window following service, applies only to those disabilities listed in 38 C.F.R. § 3.309(a). *Walker v. Shinseki*, 708 F.3d 1331 (Fed. Cir. Feb. 21, 2013).

Organic diseases of the nervous system are included in 38 C.F.R. § 3.309(a). Sensorineural hearing loss is included in 38 C.F.R. § 3.309(a) as an organic disease of the nervous system. The absence of evidence of hearing loss in service is not a bar to service connection for hearing loss. *Hensley v. Brown*, 5 Vet. App. 155, 160 (1993).

In each case where service connection for any disability is being sought, due consideration shall be given to the places, types, and circumstances of such Veteran's service as shown by such Veteran's service record, the official history of each organization in which such Veteran served, such Veteran's medical records, and all pertinent medical and lay evidence. 38 U.S.C.A. § 1154(a).

Competent medical evidence is evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions. Competent medical evidence may also include statements conveying sound medical principles found in medical treatises. It also includes statements contained in authoritative writings, such as medical and scientific articles and research reports or analyses. 38 C.F.R. § 3.159(a)(1). Competent lay evidence is any evidence not requiring that the proponent have specialized education, training, or experience. Lay evidence is competent if it is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person. 38 C.F.R. § 3.159(a)(2). This may include some medical matters, such as describing symptoms or relating a contemporaneous medical diagnosis. *Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007).

When there is an approximate balance of positive and negative evidence regarding any issue material to the determination, the benefit of the doubt is afforded the claimant. 38 U.S.C.A. § 5107(b).

IV. Hearing Loss

The Veteran asserts that he has hearing loss that is related to in-service noise exposure. He testified at the Board hearing in June 2013 that he experienced acoustic trauma when he worked as a gunner in an artillery unit. He said he experienced three fire missions a week and 200 rounds a day during his initial training. He testified that he did not wear hearing protection. Later, he was exposed to noise from being on a "45 caliber pistol team." He testified he received medical treatment for hearing loss for the first time in 1995. When asked when he began experiencing hearing loss, the Veteran testified that, "well, I noticed it probably in the '70s or early '70s I was having trouble understanding certain people."

The service treatment records are silent for hearing loss. There are no service treatment records showing complaints, treatment, or diagnosis of any hearing related problems during service. At the Veteran's separation examination in January 1965, the Veteran underwent an audiometric evaluation and no hearing loss disability was shown or noted. On the contrary, the examination showed normal hearing. Pure tone thresholds, in decibels, from the January 1965 test were as follows:

	HERTZ				
	500	**1000**	**2000**	**3000**	**4000**
RIGHT	0	0	0	0	0
LEFT	0	0	0	0	10

For the purpose of applying the laws administered by VA, impaired hearing will be considered a disability when the auditory threshold in any of the frequencies 500, 1000, 2000, 3000, or 4000 Hertz is 40 decibels or greater, or when the auditory thresholds for at least three of the frequencies 500, 1000, 2000, 3000, or 4000 Hertz are 26 decibels or greater; or when speech recognition scores using the Maryland CNC Test are less than 94 percent. 38 C.F.R. § 3.385.

The Veteran underwent a VA examination in August 2003. Pure tone thresholds, in decibels, were as follows:

	HERTZ				
	500	**1000**	**2000**	**3000**	**4000**
RIGHT	15	30	45	40	40
LEFT	25	35	50	60	60

Speech recognition scores were 92 percent in the right ear and 84 percent in the left ear. These results show hearing loss.

The examiner noted the Veteran's report of in-service noise exposure from artillery fire, rifle fire, and simulated grenades without the benefit of hearing protection. The report notes that the Veteran reported onset as ten years prior to the examination, which would have been 1993. The examiner opined that the Veteran's "hearing loss is less than likely the result of noise exposure during his military service. The rationale for this opinion is that the Veteran's hearing thresholds were established within normal hearing limits for both ears at the time of his separation from the military service."

An addendum VA medical opinion was provided in August 2012. The examiner reviewed the claims file. The examiner noted that the Veteran did not have documented hearing loss during service. The examiner concluded that it "is less than likely as not [the] Veteran's current hearing loss is caused by, a result of, or aggravated by his active military service as his hearing was normal at the time of discharge. The Institute of Medicine report (2005) on noise exposure and the military concluded that noise induced hearing loss occurs immediately and does not have a delayed onset [of] weeks, months or years after the exposure event. The study by Folmer, et al., [in 2011] found that 'pure tone thresholds did not differ significantly between veterans and non-veterans.' The Beaver Dam study…found no differences in hearing between veterans and non-veterans. Both of these studies concluded that presbycusis (hearing loss related to the natural aging process) was the most likely cause of the hearing loss observed. 'In the United States, as in other developed nations, most hearing loss develops gradually during middle or old age

without any identifiable cause of association other than advancing years.' (Tinnitus: Theory and Management, ed. JB Snow, Jr., BC Decker, Hamilton, London, 2004).

"Therefore, the Veteran's current hearing loss is not caused by, a result of, or aggravated by his active military service. There is no nexus to his active military service. As [the] Veteran had no change in hearing or threshold shift during his active military service, there is no nexus to any current hearing loss. There is no first manifestation of his present hearing loss during his active military service. Again, the Institute of Medicine Report (2005) on noise exposure and the military concluded that noise induced hearing loss occurs immediately and does not have a delayed onset [of] weeks, months or years after the exposure event."

The Board also reviewed post-service treatment records. The earliest VA treatment records are dated several decades after service, in February 2000. VA records do show treatment for hearing loss, but no opinion on etiology is found in those records.

The claims file also includes a private opinion from "Dr. C.N.B." dated in April 2013. Dr. C.N.B. talked with the Veteran over the phone and reviewed the claims file. Dr. C.N.B. noted the Veteran's noise exposure during service. He opined that "considering every possible sound medical etiology/principle, to at least the 50% level of probability that his current hearing loss/tinnitus problems are due to his experiences/trauma that the [Veteran] had during military service…" Dr. C.N.B. based his opinion on "several reasons." He noted that the Veteran had good hearing when he entered service and was exposed to loud noises during service. Dr. C.N.B. also reported that hearing loss is "cumulative" and "gets worse over time." He also criticized the medical reports relied on by the VA examiner in the August 2012 opinion. He claims the study was biased because in "his experience nearly 100% of patients exposed to artillery will have some hearing loss."

Dr. C.N.B. also indicated that the record does not support any other "plausible etiology." He also wrote that the "time lag between loud noise in service and his current acoustic pathology is consistent with known medical principles and the

natural history of this disease." Dr. C.N.B. also criticized the VA examiner because the VA opinion did not discuss the Veteran's work in the artillery unit and did not afford weight to the fact that the Veteran's left ear results from the separation examination showed some loss at the 4,000 Hz level.

The Board has also considered the lay evidence of record. The statements from the Veteran describing his symptoms are considered to be competent evidence. *King v. Shinseki*, 700 F .3d 1339, 1344 (Fed.Cir.2012) (quoting *Buchanan v. Nicholson*, 451 F.3d 1331,1335 (Fed.Cir.2006)). Further, under certain circumstances, lay statements may serve to support a claim for service connection by supporting the occurrence of lay-observable events or the presence of disability, or symptoms of disability, susceptible of lay observation. *Davidson v. Shinseki*, 581 F.3d 1313 (Fed. Cir. 2009); *Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007). The lay evidence, however, is not competent to diagnose the Veteran with hearing loss, as it is of such complexity that it does not lend itself to lay diagnosis. The Veteran testified that the earliest he sought medical treatment was in the 1990s. He also mentions that he ordered a hearing aid from a magazine in the 1970s but that it did not work.

The Board finds that the competent medical, or competent and credible lay, evidence of record fails to establish that the Veteran's hearing loss was the result of his service for which service connection may be established. While the Veteran submitted a private opinion, the Board gives greater probative weight to the VA examination from 2003 and the VA opinion from August 2012. While the private opinion is lengthy, it does not provide evidence in support of service connection. Dr. C.N.B. does not claim that the Veteran had hearing loss during service or within a year of leaving service to the degree required by 38 C.F.R. § 3.385. Dr. C.N.B. claims that the medical literature shows that hearing loss is cumulative and that acoustic trauma can occur and hearing loss onset be delayed, as in the case with the Veteran. However, he does not provide evidence or medical literature that supports that argument. Conversely, the VA examiner provided quotations and citations to medical literature that does specifically address the situation at issue. The VA examiner discussed medical literature that indicates that hearing loss occurs at the time of the acoustic trauma, and that it does not result in delayed onset. Due to that

medical fact and the fact that the evidence demonstrates that the Veteran did not begin experiencing hearing loss until many years after service, the VA examiner opined that service connection was not warranted.

The other criticisms Dr. C.N.B. has are equally without merit. Both the 2003 VA examination and the 2012 VA opinion noted the Veteran's job in the military, his exposure to noise during service, and the separation examination results. Further, despite Dr. C.N.B.'s contention that the VA examiner failed to offer any other possible etiology, the VA examiner reported that the likely cause of the Veteran's hearing loss is the Veteran's age.

The Board finds that Dr. C.N.B.'s report fails to provide evidence that the Veteran's hearing loss is related to service. Moreover, there is approximately a three decade gap in time from the Veteran's discharge to the first documented post-service complaints of hearing loss. *See Maxson v. West*, 12 Vet. App. 453, 459 (1999), *affirmed sub nom. Maxson v. Gover*, 230 F.3d 1330, 1333 (Fed. Cir. 2000) (ruling that a prolonged period without medical complaint can be considered, along with other factors, as evidence of whether an injury or a disease was incurred in service resulting in any chronic or persistent disability). The Board is of the opinion that the contemporaneous objective medical evidence from service has greater probative value than subjective statements and the audiology test conducted many years later.

Accordingly, the preponderance of the evidence is against the claim. The Board has considered the doctrine of reasonable doubt, but finds that the record does not provide an approximate balance of negative and positive evidence on the merits. The Board is unable to identify a reasonable basis for granting service connection for bilateral hearing loss in this case. *Gilbert v. Derwinski*, 1 Vet. App. 49, 57-58 (1990); 38 U.S.C.A. § 5107(b) (West 2002); 38 C.F.R. § 3.102 (2012).

(CONTINUED ON NEXT PAGE)

ORDER

As new and material evidence has been submitted, the issue of entitlement to service connection for bilateral hearing loss is reopened and to that extent the claim is granted.

Entitlement to service connection bilateral hearing loss is denied.

_____

MICHAEL MARTIN
Veterans Law Judge, Board of Veterans' Appeals

YOUR RIGHTS TO APPEAL OUR DECISION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If you want someone to represent you before the Court, rather than before the VA, you can get information on how to do so at the Court's website at: http://www.uscourts.cavc.gov. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: http://www.vetsprobono.org, mail@vetsprobono.org, or (888) 838-7727.

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

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

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

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

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

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