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

IN THE APPEAL OF TOMMY G. VINEYARD

SS [redacted]

DOCKET NO. 10-24 454) DATE *March 18, 2015*
) *CJ*
)

On appeal from the
Department of Veterans Affairs Regional Office in Waco, Texas

THE ISSUES

1. Entitlement to service connection for a left shoulder condition.

2. Entitlement to service connection for bilateral hearing loss.

3. Entitlement to service connection for a low back disorder.

REPRESENTATION

Appellant represented by: Disabled American Veterans

ATTORNEY FOR THE BOARD

R. Connally, Associate Counsel

INTRODUCTION

The Veteran, who is the appellant in this case, had service from August 1974 to August 1978. He did not have foreign service.

This matter comes to the Board of Veterans' Appeals (Board) on appeal from an October 2009 decision of the Regional Office (RO) in Waco, Texas.

The Board previously considered these and other matters in March 2014. The Veteran appealed the Board's decision regarding service connection for both bilateral hearing loss and a left shoulder condition to the United States Court of Appeals for Veterans Claims (Court). In December 2014, the Court issued an Order granting a Joint Motion for Partial Remand by the parties—vacating the decision with respect to these two issues—and remanding the matters to the Board for further action. According to the Joint Motion for Partial Remand, the Veteran does not intend to continue his appeal for entitlement to service connection for a left hip condition, right shoulder condition, nose fracture, sleep apnea, and bilateral knee conditions. Service connection for a low back disorder was not addressed by the Court because the Board did not previously make a final decision on this issue in its March 2014 decision. This issue was remanded for further record development. The case returned to the Board for further appellate review after that development was completed.

The issues of entitlement to service connection for bilateral hearing loss and a low back disorder are addressed in the REMAND portion of the decision below and are REMANDED to the Agency of Original Jurisdiction (AOJ).

FINDINGS OF FACT

1. The Veteran sought medical treatment for the left shoulder in service and a November 1975 X-ray examination of the left shoulder was normal and the report noted that the findings were suggestive of clavicular joint widening.

2. The Veteran did not have chronic symptoms of a left shoulder condition in service or continuous symptoms since service separation, and the current mild impingement syndrome of the left shoulder first manifested many years after service separation, and is not related to disease, injury, or other event in service.

CONCLUSION OF LAW

The criteria regarding service connection for a left shoulder condition have not been met. 38 U.S.C.A. §§ 1110, 5103, 5103A, 5107 (West 2014); 38 C.F.R. §§ 3.102, 3.159, 3.303, 3.307, 3.309 (2014).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The Board has thoroughly reviewed all the evidence in the Veteran's claims file. Although the Board has an obligation to provide reasons and bases supporting this decision, there is no need to discuss, in detail, all of the evidence submitted by the Veteran or on his behalf. *See Gonzales v. West*, 218 F.3d 1378, 1380-81 (Fed. Cir. 2000) (the Board must review the entire record, but does not have to discuss each piece of evidence). The analysis below focuses on the most salient and relevant evidence and on what this evidence shows, or fails to show, on the claims. 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) (the law requires only that the Board address its reasons for rejecting evidence favorable to the Veteran).

The Board must assess the credibility and weight of all evidence, including the medical evidence, to determine its probative value, accounting for evidence which it finds to be persuasive or unpersuasive, and providing reasons for rejecting any evidence favorable to the claimant. Equal weight is not accorded to each piece of evidence contained in the record; every item of evidence does not have the same probative value. When all the evidence is assembled, VA is responsible for determining whether the evidence supports the claim or is in relative equipoise,

with the appellant prevailing in either event, or whether a preponderance of the evidence is against a claim, in which case, the claim is denied. *See Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

When there is an approximate balance in the evidence regarding the merits of an issue material to the determination of the matter, the benefit of the doubt in resolving each such issue shall be given to the claimant. 38 U.S.C.A. § 5107(b) (West 2014); 38 C.F.R. § 3.102 (2014). The Court has held that an appellant need only demonstrate that there is an "approximate balance of positive and negative evidence" in order to prevail. *See Gilbert*, 1 Vet. App. at 53. The Court has also stated, "[i]t is clear that to deny a claim on its merits, the evidence must preponderate against the claim." *Alemany v. Brown*, 9 Vet. App. 518, 519 (1996), citing *Gilbert*.

Service Connection for a Left Shoulder Condition

The Veteran asserts that service connection is warranted for his current left shoulder condition because he remembers that he dislocated his shoulder once while in service. Service connection may be granted for a disability resulting from disease or injury incurred in or aggravated by active military, naval, or air service. 38 U.S.C.A. § 1110 (West 2014); 38 C.F.R. § 3.303(a) (2014). Service connection may be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d).

As a general matter, service connection for a disability requires evidence of: (1) the existence of a current disability; (2) the existence of the disease or injury in service, and; (3) a relationship or nexus between the current disability and any injury or disease during service. *Shedden v. Principi*, 381 F.3d 1163 (Fed. Cir. 2004); *see also Hickson v. West*, 12 Vet. App. 247, 253 (1999), citing *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd*, 78 F.3d 604 (Fed. Cir. 1996).

Generally, lay evidence is competent with regard to a disease with "unique and readily identifiable features" that is "capable of lay observation." *See Barr v.*

Nicholson, 21 Vet. App. 303, 308-09 (2007). Mild impingement syndrome of the left shoulder is not a disability capable of lay observation. *See Charles v. Principi*, 16 Vet. App. 370, 374 (2002).

Lay evidence can be competent and sufficient evidence of a diagnosis if (1) the layperson is competent to identify the medical condition, (2) the layperson is reporting a contemporaneous medical diagnosis, or (3) lay testimony describing symptoms at the time supports a later diagnosis by a medical professional. *See Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); *Jandreau v. Nicholson*, 492 F.3d 1372, 1376-77 (Fed. Cir. 2007). Additionally, a lay person may speak to etiology in some limited circumstances in which nexus is obvious merely through observation, such as sustaining a fall leading to a broken leg. *Id*.

However, a lay person is not competent to provide evidence as to more complex medical questions and, specifically, is not competent to provide an opinion as to etiology in such cases. *See Woehlaert v. Nicholson*, 21 Vet. App. 456, 462 (2007) (concerning rheumatic fever). *See* 38 C.F.R. § 3.159(a)(2).

Arthritis is a "chronic disease" under 38 C.F.R. § 3.309(a); therefore, the presumptive provisions of 38 C.F.R. § 3.303(b) apply. *Walker v. Shinseki*, 708 F.3d 1331 (Fed. Cir. 2013). Where the evidence shows a "chronic disease" in service or "continuity of symptoms" after service, the disease shall be presumed to have been incurred in service. In order to show a "chronic" disease in service, the record must reflect a combination of manifestations sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time. Where a chronic disease has been incurred in service, subsequent manifestations of the same chronic disease at any later date, however remote, are service-connected unless clearly attributable to intercurrent causes. If a condition noted during service is not shown to be chronic, then generally, a showing of "continuity of symptoms" after service is required in order to establish entitlement to service connection. 38 C.F.R. § 3.303(b).

Where a veteran who served for ninety days or more during a period of war (or during peacetime service after December 31, 1946) develops certain chronic

diseases, such as arthritis, to a degree of 10 percent or more within one year of separation from service, such diseases may be presumed to have been incurred in service even though there is no evidence of such disease during the period of service. This presumption is rebuttable by affirmative evidence to the contrary. *See* 38 U.S.C.A. §§ 1101, 1112, 1113, 1137; 38 C.F.R. §§ 3.307, 3.309.

Service treatment records show that the Veteran underwent an X-ray examination of the left shoulder in November 1975. The service treatment record noted that the clinical history was "On Base sports." The X-ray examination report indicates that the Veteran's left shoulder was normal, but there was some suggestion of clavicular joint widening. The Veteran waived the separation examination.

On VA examination in April 2010, the Veteran reported that he dislocated his left shoulder in service around 1975 or 1976. He stated that around 1995 he started noticing increased shoulder discomfort along with pain, weakness, and numbness in his left hand. The examiner noted that the Veteran has paresthesias that radiate down into his hand, but the pain is centered in the shoulder and is diffuse. The Veteran is also noted to be right hand dominant.

Physical examination revealed that the shoulders were symmetrical in appearance. There was no evidence of swelling, muscular atrophy, or fasciculations of the trapezius, deltoids, rhomboids, scapular, or pectoral muscles. Muscle strength was assessed as 4/5. There was no abnormal positioning of the joint or abnormal body landmarks. There was no evidence of synovial cysts or synovitis. There was tenderness to palpation of the left shoulder. The Veteran's reaction to light touch of the skin was nonphysiological. The anterior humeral head was particularly tender even to light touch. There was pain to light touch to the deltoid, acromioclavicular joint, and scapula.

Range of motion testing of the left shoulder was limited to pain and not to anatomic abnormality. It was too painful for the Veteran to reach overhead fully. Grip was weak on the left. Radiographic imaging of the shoulders in 2010 show that the acromioclavicular and glenohumeral joints were normal. There was no calcification at the attachment of the tendons. The diagnosis was mild impingement syndrome of

the left shoulder. The examiner opined that the Veteran's current left shoulder condition was less likely than not caused by or a result of a remote dislocation that occurred when the Veteran was in service over 30 years ago. The examiner also noted that he could not find an entry for a shoulder dislocation in the Veteran's health records.

The Board has considered the Veteran's statements of record that he dislocated his left shoulder in service and also that this is the cause of his current condition. In rendering a decision on appeal, the Board must analyze the credibility and probative value of the evidence, account for the evidence which it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *See Gabrielson v. Brown*, 7 Vet. App. 36, 39-40 (1994); *Gilbert*, 1 Vet. App. at 57. Competency of evidence differs from weight and credibility. The former is a legal concept determining whether testimony may be heard and considered by the trier of fact, while the latter is a factual determination going to the probative value of the evidence to be made after the evidence has been admitted. *Rucker v. Brown*, 10 Vet. App. 67, 74 (1997); *Layno v. Brown*, 6 Vet. App. 465, 469 (1994); *see also Cartright v. Derwinski*, 2 Vet. App. 24, 25 (1991) ("although interest may affect the credibility of testimony, it does not affect competency to testify").

The Veteran is competent to report symptomatology relating to pain in his left shoulder because this requires only personal knowledge as it comes to him through his senses. *Layno*, 6 Vet. App. at 470. The only service record showing treatment of the Veteran's left shoulder does not state that a dislocation occurred. The Board finds that the Veteran did sustain some injury to his left shoulder in service which required medical treatment. So, to this extent, his assertion of an injury in service is credible.

The Veteran has made a general assertion that the current left shoulder condition is related to the dislocation in service. However, the Board cannot rely solely on the Veteran's general assertion as to a positive nexus to service because he is not shown to possess the type of medical expertise that would be necessary to opine regarding the origins of an orthopedic disability. Although lay persons are competent to

provide opinions on some medical issues, an opinion in this specific case as to the etiology and onset of impingement syndrome and whether this condition first manifested in service or is due to a shoulder dislocation in service falls outside the realm of common knowledge of a lay person. *See Kahana v. Shinseki*, 24 Vet. App. 428, 435 (2011); *Jandreau*, 492 F. .3d at 1377 n.4 (lay persons not competent to diagnose cancer). The question of causation, in this case, involves a complex medical issue that the Veteran is not competent to address. *Jandreau; supra.* Even though the Veteran was a medical service assistant in service, he has not provided any evidence as to the type of medical training he may have undergone. There is no competent evidence showing that the Veteran had medical training so that he is able to render a medical diagnosis or provide an opinion as to the etiology of an orthopedic disability. The weight of the competent and credible evidence establishes that the left shoulder condition, to include mild impingement syndrome, first manifested many years after active service and is not related to any injury or event in service.

In the alternative, even if the Board were to assign probative value by finding the Veteran's statements both competent and credible that he dislocated his left shoulder in service the Board finds the VA medical opinion outweighs the Veteran's statements. Competent and credible evidence concerning the nature and extent of the Veteran's condition has been provided by the VA examiner during the current appeal and includes relevant medical findings in conjunction with the examination. In this regard, the medical findings (as provided in the examination report) directly address the nexus determination and state that the Veteran's left shoulder condition "is less likely than not caused by or a result of a remote dislocation that occurred when he was in the service over 30 years ago," despite whether a service treatment record for this incident exists. Moreover, the Board notes that there is only one documented instance of a left shoulder injury during service; however, the pertinent clinical history noted on this treatment record states "On Base sports." Notably, the Veteran has never attributed his shoulder dislocation to this specific incident. The Board also notes that the Veteran's service treatment records contain documentation of many other injuries and illnesses of varying degrees in severity. In cases where the Veteran was not involved in combat, "…the Board may use silence in the [service treatment records] as

contradictory evidence only if the alleged injury, disease, or related symptoms would ordinarily have been recorded in the [service treatment records]." *Kahana v. Shinseki*, 24 Vet. App. 428, 440 (Lance, J., concurring; *see also* FED.R.EVID. 803(7) (the absence of an entry in a record may be evidence against the existence of a fact if such a fact would ordinarily be recorded). Based on the foregoing, the Board assigns less probative weight to the Veteran's statements that his shoulder dislocation during service is connected to his current mild left shoulder impingement syndrome.

The Board finds that the weight of the competent and credible evidence shows that a left shoulder condition did not manifest in service, first manifested many years after active service, and is not related to service. There is no evidence of a diagnosis of a left shoulder condition in service or for many years thereafter. The service treatment records show that the Veteran underwent X-ray examination of the left shoulder in November 1975, but a diagnosis was not made. It was noted that the left shoulder was normal with findings suggestive of clavicular joint widening. There is no competent and credible evidence of chronic symptoms of a left shoulder condition in service or continuous left shoulder symptoms since service separation. The post service treatment records do not document complaints or treatment for a left shoulder condition. The Veteran has not described or identified any lay testimony as to left shoulder symptoms in service and since service.

In light of the above, the Board finds that the preponderance of the evidence is against a finding that the left shoulder condition, to include mild impingement syndrome, is related to service. As the preponderance of the evidence is against the Veteran's claim, the benefit of the doubt rule is not applicable and the claim is denied. *See* 38 U.S.C.A. § 5107(b); *Gilbert v. Derwinski*, 1 Vet. App. 49, 54-56 (1990).

Duties to Notify and Assist

The Veterans Claims Assistance Act of 2000 (VCAA) describes VA's duties to notify and assist claimants in substantiating a claim for VA benefits. 38 U.S.C.A.

§§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2014); 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.326(a) (2014). Upon receipt of a complete or substantially complete application for benefits, VA is required to notify the claimant and his or her representative, if any, of any information, and any medical or lay evidence, that is necessary to substantiate the claim and of the relative duties of VA and the claimant for procuring that evidence. 38 U.S.C.A. § 5103(a); 38 C.F.R. § 3.159(b).

VCAA notice should be provided prior to an initial unfavorable decision on a claim by the agency of original jurisdiction (AOJ). *Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006). The RO provided a letter to the Veteran in August 2009, prior to the initial adjudication of the service connection claim on appeal. The letter notified the Veteran of what information and evidence must be submitted to substantiate the claim, including a description of what information and evidence must be provided by the Veteran and what information and evidence would be obtained by VA. The Veteran was also advised to inform VA of any additional information or evidence that VA should have, and to submit evidence in support of the claim to the RO. The content of the letter complied with the requirements of 38 U.S.C.A. § 5103(a) and 38 C.F.R. § 3.159(b).

The notice requirements of the VCAA apply to all 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/Hartman v. Nicholson*, 19 Vet. App. 473 (2006). Further, this notice must include information that a disability rating and an effective date for the award of benefits will be assigned if service connection is awarded. *Id*. at 486. The Veteran was provided with such notice by the August 2009 letter, including the type of evidence necessary to establish a disability rating and effective dates.

Next, VA has a duty to assist a veteran in the development of the claim. To that end, VA must make reasonable efforts to assist the claimant in obtaining evidence necessary to substantiate the claim for the benefit sought, unless no reasonable possibility exists that such assistance would aid in substantiating the claim. 38 U.S.C.A. § 5103A; 38 C.F.R. § 3.159; *see Golz v. Shinseki*, 590 F.3d 1317, 1320-21

(2010) (stating that the "duty to assist is not boundless in its scope" and "not all medical records . . . must be sought - only those that are relevant to the veteran's claim"). Here, service records have been obtained as have records of VA treatment. Based on the foregoing, the Board finds that VA has met its duty to assist with regard to records development.

The Veteran was afforded a VA examination with respect to his claim in April 2010. During that examination, the VA examiner conducted a physical examination of the Veteran with diagnostic testing, was provided the claims file for review, took down the Veteran's history, considered the lay evidence presented, laid a factual foundation for the conclusions reached, and reached conclusions and offered opinions based on history and examination that are consistent with the record. Accordingly, the Board finds that VA's duty to assist with respect to obtaining a VA examination or opinion has been met regarding the matter on appeal. 38 C.F.R. § 3.159(c)(4); *Sickels v. Shinseki*, 643 F.3d 1362 (Fed. Cir. 2011) (holding that the Board is entitled to presume the competence of a VA examiner and the adequacy of their opinion).

All necessary development has been accomplished; therefore, appellate review may proceed without prejudice to the Veteran. *See Bernard v. Brown*, 4 Vet. App. 384 (1993). In addition to the evidence discussed above, the Veteran's statements in support of the claim are also of record. The Board has carefully considered such statements, and concludes that no available outstanding evidence has been identified. Additionally, the Board has reviewed the medical records 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 claim. For these reasons, the Board finds that the duties to notify and assist the Veteran in the development of this claim have been met, so that no further notice or assistance to the Veteran is required to fulfill VA's duty to assist. *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).

ORDER

Entitlement to service connection for a left shoulder condition is denied.

REMAND

Service Connection for a Low Back Disorder

Additional development is necessary before the Board can proceed on the merits of the claim for service connection for a low back condition.

The Veteran contends that he injured his back in service and that a herniated disc was diagnosed. He contends that his current service treatment records are not complete and should contain an X-ray examination of the low back. *See* June 2010 VA Form 9, and January 2012 VA neurosurgeon consult record. In a February 2010 statement, the Veteran's brother indicated that while they were both at a military recruiting event in 1975, the Veteran injured his back when he fell off a trampoline. He took the Veteran to the emergency room at the Dallas Naval Air Station in Grand Prairie, Texas. The Veteran's brother indicated that X-ray examination revealed ruptured discs at L3 and L4, and indicated that the Veteran was informed that the X-ray examination reports would be sent to his active duty station at Lackland Air Force Base.

A review of the record shows that after the March 2014 Board remand on this issue, a search was incorrectly made for hospital treatment records from the Dallas VAMC. However, the Veteran had previously stated he received treatment at the Dallas Naval Air Station in Grand Prairie, Texas, which is not part of the VA system. The evidence of record does not indicate that requests were made for records from this Department of Defense location. The Board is aware that this base was decommissioned in 1998 and was relocated. The new base is named NAS Forth Worth, Joint Reserve Base (JRB) at Carswell. A new search must be conducted as VA has a duty to seek these records. 38 U.S.C.A. § 5103A(b)(3).

Service Connection for Bilateral Hearing Loss

This matter must be remanded to obtain a supplemental medical opinion. As noted, the Court granted a Joint Motion for Partial Remand in December 2014. The parties agreed that the Board committed remandable error by relying on an inadequate VA medical opinion. *See Ardison v. Brown*, 6 Vet. App. 405, 407 (1994). The parties stated that the Board incorrectly denied the Veteran's claim in large part based on the opinion of the September 2009 VA examiner, who did not consider the existence of an audiogram, which the Board conceded in its decision was provided while the Veteran was in service. The Court agreed that the September 2009 VA opinion is inadequate, insofar as it was based on an inaccurate factual premise. *See Reonal v. Brown*, 5 Vet. App. 458, 460 (1993) (holding that medical opinions based on an inaccurate factual premise have no probative value). In the 2009 examination, the examiner wrote that, "since an audio exam was not performed at separation, a definitive opinion regarding hearing loss as a result of military service cannot be rendered without resorting to speculation." A medical opinion without any explanation or rationale to support its conclusion is of little probative value. *See Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 304 (2008) (holding that a probative medical opinion will be "factually accurate, fully articulated, [with] sound reasoning for the conclusion"); *Stefl v. Nicholson*, 21 Vet. App. 120, 124 (2007) (holding that a VA medical opinion "must support its conclusion with an analysis that the Board can consider and weigh against contrary opinions").

With consideration of the above, the Board is remanding the issue of service connection for bilateral hearing loss claim for an addendum VA medical opinion, in which the undated in-service audiogram is taken into account. *See Barr*, 21 Vet. App. at 311.

Accordingly, the case is REMANDED for the following action:

1. Contact the appropriate service department, including the National Personnel Records Center, and conduct a search for the Veteran's service clinical records and/or

hospital records dated in 1975 showing treatment for a low back injury and disability to include any clinical or hospital records from the ***Dallas Naval Air Station*** in Grand Prairie, Texas. Incorporate any such records in the Veteran's claims file. Please note that the Dallas Naval Air Station was decommissioned in 1998 and was relocated. The new base is named NAS Forth Worth, Joint Reserve Base (JRB) at Carswell.

2. Complete any further development indicated by any response received upon remand.

3. An addendum opinion should be obtained to clarify as to whether the Veteran's bilateral hearing loss was incurred in active service. All indicated tests and studies are to be performed. Prior to providing the opinion, the claims folder must be made available for review of the case. A notation to the effect that this record review took place should be included in the opinion.

The examiner should address whether any current diagnosis of bilateral hearing loss is at least as likely as not (i.e., probability of 50 percent) related to his military service, to include in-service noise exposure.

The examiner should also comment on whether the undated service audiometric test results, which are shown in a graph and are not reported in decibels, indicate decreased hearing while the Veteran was in service.

Note: The term "at least as likely as not" does not mean merely within the realm of medical possibility, but that the medical evidence for and against a conclusion is so evenly

> divided that it is as medically sound to find in favor of causation as it is to find against it. All opinions are to be accompanied by a rationale consistent with the evidence of record. If the requested medical opinion cannot be given, the examiner should state the reason(s) why.
>
> Please note that the Court of Appeals for Veteran's Claims has found that an absence of in-service hearing loss is an insufficient reason, in and of itself, to deny service connection for hearing loss without further rationale to adequately support such an opinion. *See Hensley v. Brown*, 5 Vet. App. 155, 163 (1993) (service connection may be granted for any disease initially diagnosed after service when all of the evidence, including that pertinent to service, establishes that the disease was incurred in service).
>
> 4. After completing all indicated development, readjudicate the claims remaining on appeal in light of all the evidence of record. If any benefit sought on appeal remains denied, then a fully responsive Supplemental Statement of the Case should be furnished to the Veteran and his representative and they should be afforded a reasonable opportunity to respond.

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

This claim must be afforded expeditious treatment. The law requires that all claims remanded by the Board of Veterans' Appeals or by the United States Court of

Appeals for Veterans Claims for additional development or other appropriate action must be handled in an expeditious manner. *See* 38 U.S.C.A. §§ 5109B, 7112.

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M. TENNER
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).