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

IN THE APPEAL OF [redacted]
GARRETT P. NEMEC

DOCKET NO. 11-08 004) DATE *January 28, 2015*
) *BW*
)

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

THE ISSUE

Entitlement to service connection for degenerative disc disease of the lumbar spine.

REPRESENTATION

Appellant represented by: Texas Veterans Commission

WITNESS AT HEARING ON APPEAL

Appellant

ATTORNEY FOR THE BOARD

T. Wishard, Counsel

INTRODUCTION

The Veteran had active military service from February 1960 to February 1964.

This matter comes before the Board of Veterans' Appeals (Board) from a January 2011 rating decision of the Department of Veterans Affairs (VA), Regional Office (RO) in Houston, Texas.

In November 2012, the Veteran testified before a Decision Review Officer in Houston, Texas. A transcript of that hearing is of record.

In October 2014, the Veteran testified at a videoconference hearing before the undersigned Veterans Law Judge. A transcript of that hearing is of record.

This matter was previously before the Board in August 2012 and was remanded for a Board hearing. It has now returned to the Board for further appellate consideration.

FINDINGS OF FACT

1. The earliest post service clinical evidence of a back complaint is in 2004, more than four decades after separation from service.

2. The Veteran stated in 2004 that his current back disability began nine years earlier, or in approximately 1995, more than three decades after separation from service.

3. The Veteran's 2004 statements as to the onset of his pain in 1995 are more probative than later statements that he has had pain since service.

4. The most probative evidence of record is against a finding that the Veteran has a lumbar spine disability causally related to active service.

CONCLUSION OF LAW

The criteria for service connection for a lumbar spine disability (degenerative disc disease) have not been met. 38 U.S.C.A. §§ 1101, 1110, 1112, 1113, 5103A, 5107(b) (West 2002); 38 C.F.R. §§ 3.102, 3.303, 3.304, 3,307, 3.309, 3.310 (2014).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

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). *See also Pelegrini v. Principi*, 18 Vet. App. 112 (2004); *Quartuccio v. Principi*, 16 Vet. App. 183 (2002); *Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006); *Dingess v. Nicholson*, 19 Vet. App. 473 (2006). Notice was provided in August 2010.

The claims file includes service treatment records (STRs), post service clinical records, an excerpt from "Clinical Orthopaedic Examination", and the statements of the Veteran and others in support of his claim. The Board has considered the statements and perused 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 which VA has a duty to obtain. The Veteran has stated that he had private treatment earlier than 2009 but that those records are not available. (*See* Board hearing testimony and DRO hearing testimony.) Thus, without authorization from the Veteran, VA does not have a duty to attempt to obtain possible additional records.

Legal Criteria

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) 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. 2013).

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).

Analysis

The Board has reviewed all of the evidence in the Veteran's claims file, with an emphasis on the evidence relevant to this appeal. 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 of record. *Gonzales v. West*, 218 F.3d 1378, 1380-81 (Fed. Cir. 2000). Therefore, the Board will summarize the relevant evidence where appropriate, and the Board's analysis below will focus specifically on what the evidence shows, or fails to show, as to the claim.

The Veteran avers that he has degenerative disc disease due to a lifting incident in December 1962. An essential element of a claim for service connection is evidence of a current disability. The Veteran has been diagnosed with L1-2 disc degeneration with disc bulging, central canal stenosis with foraminal stenosis; L2-3 disc degenerative with brood based disc bulging and posterior central annular tear, bilateral foraminal stenosis secondary to lateralizing disc bulge; L3-4, restrolisthesis and disc bulging and central canal stenosis, mild facet arthropathy, bilateral foraminal stenosis; L4-5 disc desiccation and degeneration, disc bulging, hypertrophic central canal stenosis, facet arthropathy, bilateral foraminal stenosis; and L5-S1 facet arthropathy and foraminal stenosis. Thus, this element has been met.

A second requirement for service connection is medical evidence, or in certain circumstances lay testimony, of in-service incurrence or aggravation of an injury or disease. The Veteran's STRs dated December 6 and 7, 1962 reflect that he complained of back pain upon movement of the back. It was noted that he had been lifting weights. He was prescribed heat and Paraflex. There are no other STRs which reflect complaints of the back and the Veteran testified at the DRO hearing that he did not seek further treatment for his back after the December 1962 complaints. The Veteran's February 1964 report of medical examination for separation purposes reflects that the Veteran's spine was normal.

The Veteran testified at the Board hearing that he did not seek further treatment in service because the pain had subsided considerably after the initial complaint and because the Marine Corps "is pretty tough on malingering" and he did not want to get anybody upset by taking off any more time than he had to. (*See* Board hearing transcript, page 4.) He testified that he would subsequently drive with a pillow behind his back. The Board notes that the STRs reflect that the Veteran sought subsequent treatment in March 1963 for an ingrowing toe nail, and in July 1963 for a coral cut on the third toe of the left foot. Thus, it seems reasonable that if the Veteran had back pain in his last 14 months of service, he would have sought treatment for it as he sought treatment for other conditions.

A third requirement for service connection is competent credible evidence of a nexus between the current disability and the in-service disease or injury. The Board finds, for the reasons noted below, that the most probative evidence is against a finding of service connection.

The Veteran had an initial primary care evaluation for VA purposes in October 2002. The report notes a problem list of preventive health, erectile dysfunction, subclinical hyperthyroidism, and smoking. The Veteran was noted to be very concerned about his smoking, and also with the cost of Wellbutrin, which he had previously taken. The Veteran's family history was noted to be positive for CVA (cerebrovascular accident), lung cancer, and colon cancer. The record is negative for any complaints of chronic back pain since service.

A May 2003 VA primary care follow up visit reflects that the Veteran reported that he was getting headaches occasionally, but was otherwise well. The assessment was smoking cessation, erectile dysfunction, and a family history of colon cancer. The report is negative for any complaints of chronic back pain since service.

The Veteran was seen for a primary care follow up visit in October 2003. At that time, he complained of a right MTP (metatarsophalangeal) plantar pain with walking and also left little toe pain. The Veteran was assessed with smoking cessation, erectile dysfunction, foot calluses, and elevated blood pressure. The report is negative for any complaints of chronic back pain since service.

A February 2004 primary care note reflects an assessment of erectile dysfunction and depression. The report is negative for any complaints of chronic back pain since service.

The earliest clinical evidence of low back complaints is in June 2004, forty years after separation from service. The lapse of time between service separation and the earliest documentation of current disability is a factor for consideration in deciding a service connection claim. *See Maxson v. Gober,* 230 F.3d 1330, 1333 (Fed. Cir. 2000).

The June 2004 VA record reflects low back pain with lower extremity numbness. Radiology records reflect lumbar spine bony degenerative changes, minimal L3-4 disc narrowing, aortoiliac atherosclerosis, probable patient obesity, mild lumbar curvature concave on the left side, and an otherwise unremarkable lumbosacral spine exam.

A September 2004 VA neurosurgery consult reflects that the Veteran reported low back pain for *nine years*. He also reported occasional radiation of a "tickling sensation" to the bilateral thighs. Thus, when seeking treatment for back and tickling sensation, the Veteran reported the onset of his pain as approximately 1995, more than 30 years after separation from service. The Board finds that, in general, statements as to the onset of pain made for treatment purposes are more credible than those made for compensation purposes. *See Cartright v. Derwinski*, 2 Vet. App.24, 25 (1991) (finding that, while the Board may not ignore a Veteran's testimony simply because he or she is an interested party and stands to gain monetary benefits, personal interest may affect the credibility of the evidence*); see also Caluza v. Brown*, 7 Vet. App. 498, 510-511 (1995) (credibility can be generally evaluated by a showing of interest, bias, or inconsistent statements, and the demeanor of the witness, facial plausibility of the testimony, and the consistency of the testimony).

A December 2004 VA record reflects that the Veteran reported that he had had an aching pain, which had remained the same, for the *past nine years* and which had

begun after some bouts of heavy lifting. It notes that occasionally the Veteran takes his wife's Celebrex with some good relief of his pain, and that he has had intermittent tingling over the past year. The report is negative for any statement that the Veteran had had pain for the past 40 years after an incident in service, or any prior treatment specific to the low back in prior years.

Private records beginning in 2009 are also associated with the claims file. A July 2009 record reflects that the Veteran had a five year history of low back pain, leg numbness, and bilateral plantar foot numbness. A March 2004 VA clinical record reflects that the Veteran had to stop playing golf for six weeks due to a toe problem.

Post service, the Veteran was employed pumping gas and in sales, and owned a nightclub. He also earned his pilot's license, and passed a Class I Physical by a Federal Aviation Medical Examiner. (*See* May 1968 Midwest Airways, Inc. correspondence.)

The Veteran filed a claim for entitlement to service connection for a back disability in July 2010. Prior to filing a claim for compensation, the Veteran reported that his back pain began in approximately 1995 and became worse in 2004.

The claims file includes several medical opinions as to the etiology of the Veteran's current spine disability. The probative value of medical opinions is based on the medical expert's personal examination of the patient, the physician's knowledge and skill in analyzing the data, and the medical conclusion that the physician reaches. There is no requirement that additional evidentiary weight be given to the opinion of a medical provider who treats a veteran; courts have repeatedly declined to adopt the "treating physician rule." *See White v. Principe*, 243 F.3d 1378, 1381 (Fed. Cir. 2001); *Van Slack v. Brown*, 5 Vet. App. 499, 502 (1993). *See also Guarneri v. Brown*, 4 Vet. App. 467, 470-71 (1993).

December 2010 correspondence from Dr. M.W. reflects that the Veteran reported that he injured his low back lifting weights in December 1962 and that he has continued to have low back pain since. She opined that the December 1962 incident was "likely the time of an acute disc herniation based on [the Veteran's]

description of the onset and nature of the pain." She further stated "I do believe his initial injury occurred while he was serving the Marine Corps and has continued to be a source of pain and disability."

Correspondence from Dr. R. B. received by VA in March 2011 reflects that he has been seeing the Veteran since 2009 for back pain. It was noted that the Veteran reported after injuring his back in 1962, he has been having pain off and on, and had become progressive worse in approximately 2004. Dr. R.B. opined "I believe that this is likely the cause of his back pain. It is medically reasonable that any degenerative changes to his lumbar spine, which are present today, began with his injury in 1962."

In April 2011 correspondence, Dr. R. B. stated that the Veteran's weight lifting injury in service is a likely cause of pain in the lower back and legs. Dr. R.B. stated that "[w]ith the description of the injury that caused [the Veteran] to visit the base doctor in 1962 is consistent with my previous opinion of the onset of his degenerative disc disease. . . . I have based my opinion as a specialist training in operative and non-operative management of degenerative spinal disease, in conjunction with my review of [a 2009 MRI and VA x-ray]. My opinion is also based on [the Veteran's] statement describing his occupations from his injury to the present."

October 2014 correspondence from Dr. R.A.M. reflects that the Veteran reported that his pain began in December 1962 and since that time, his back has never been the same. Dr. R.A.M. stated that in evaluating the Veteran's records it is clear that he "at a minimum sustained a muscle sprain strain." He also stated that "it is likely that he sustained internal derangement of a lumbosacral disc, such as a tear of the annular. This arrangement would accelerate the degenerative disc cascade." He opined that the Veteran's "current state is as likely as not or more likely than not than less likely related to his weight training incident December 1962 incident. No advanced imaging at the time was obtained. The patient relates his lumbar spine symptoms as beginning after his incident in the Marines." Dr. R.A.M. stated in other correspondence that his rationale is that most mechanical spine disorders that cause neck and back pain involve a non-specific mechanical derangement, muscle

strain, ligament spine spasm or a combination. Dr. R.A.M. stated that only about 15 percent involve specific structural lesions that clearly cause the symptoms, primarily the following: disk herniation, compression fracture, lumbar spinal stenosis, osteoarthritis, spondylolisthesis."

A December 2010 VA examination report is of record. The examiner opined that the Veteran's current disability of the lumbar spine is due to his aging and not due to military service. The examiner's opinion was based on the lack of treatment in service after the initial December 1962 complaints, without an indication of significant back problems in service. A December 2011 addendum reflects the opinion of the examiner that the Veteran had one episode of minor muscular strain in service, which would not involve the spinal column and which did not provide any chronic problems that would have progressed to any kind of back situation today. The examiner also noted that the most common mechanisms that initiate osteoarthritis are genetics and age. The examiner also noted in pertinent part, as follows:

> In order for there to be a traumatic event to initiate degenerative changes in the spine, there has to be a traumatic event serious enough to injury the spinal column itself. Most of the time when people get lumbar strain, it is either a latissimus dorsi type muscle strain which has little attachment to the spinous processes and no attachment to the spinal body. Therefore, a minor muscle strain like this veteran had in 1962, which he only complained of once would not produce enough mechanical force to alter the spinal column in and of itself.

The Board finds that the VA opinions are the most probative. Initially, the Board finds that the Veteran is less than credible as to statements that he has had pain since service. Not only are the STRs negative for any complaints after December 1962, but the Veteran has reported that he did not seek further treatment in service. The Board finds that the December 1962 incident was acute and transitory. The Board acknowledges the Veteran's statements that he had pain continuous or "off

and on" and that he did not seek treatment; however, the Board finds that if the Veteran had pain in the 14 remaining months of service, it would have been reasonable for him to have sought treatment for it. In addition, and importantly, the Veteran stated in 2004 that the onset of his current back pain was in approximately 1995. Thus indicating that his pain in service was not continuous.

The opinion of the VA examiner that the Veteran had a minor strain is supported by the lack of follow-up treatment in the subsequent 14 months of service, and the lack of prescribed medication other than muscle relaxant in December 1962. The VA examiner's opinions are based on review of the medical records, the treatment in December 1962, the Veteran's lack of need for treatment in the last 14 months of service, and the Veteran's age upon diagnosis. Adequate rationale with regard to traumatic events and muscle strain was provided. The Board finds that the examiner need not discuss statements as to continuity of symptoms since service because the Board finds that they are less than credible. The examiner's failure to discuss the Veteran's contention that his pain began in 1995 as opposed to the earliest clinical evidence in 2004 is de minimis considering the more than three decades since separation from service.

The opinion of Dr. M.W. is based on the Veteran's self-reported history that he has continued to have low back pain since December 1962. She also noted that the incident was likely an acute disc herniation *based on the Veteran's reported history*. Medical opinions premised upon an unsubstantiated account of a claimant are of no probative value. *See, e.g., Swann v. Brown*, 5 Vet. App. 229, 233 (1993) (generally observing that a medical opinion premised upon an unsubstantiated account is of no probative value, and does not serve to verify the occurrences described); *Reonal v. Brown*, 5 Vet. App. 458, 461 (1993) (the Board is not bound to accept a physician's opinion when it is based exclusively on the recitations of a claimant). She failed to provide an adequate rationale as to why the Veteran likely had a herniated disc in service rather than a muscle strain. (She did not explain lack of buttocks pain, thigh pain, calf pain, foot pain, numbness, tingling, weakness, or that the pain subsided without medication other than muscle relaxant, or any specific reason why the Veteran likely had a disc herniation rather than a muscle strain).

Dr. R.B.'s opinion is also based on the Veteran's description of the injury, without adequate discussion of the Veteran's lack of leg pain, buttocks pain, or tingling in December 1962, the 1962 examiner's decision that an x-ray was not needed based on the Veteran's reported symptoms, the 1962 examiner's lack of prescribing medication other than a muscle relaxant, the ability of the Veteran to remain in service for an additional 14 months without treatment, and the Veteran's report in 2004 that the onset of his current back pain was in 1995.

Dr. R.A.M.'s opinion is also based on the Veteran's report of symptoms since service. His opinion that the Veteran likely sustained internal derangement of a lumbosacral disc, such as a tear of the annular, is not supported by adequate rationale. While he is correct that no imaging was done at 1962, he does not adequately discuss that the 1962 examiner did not feel the need to order x-rays based on the Veteran's symptoms, the Veteran's lack of noted leg pain, buttocks pain, or tingling in December 1962, the treatment of his back injury with a muscle relaxant, the 1962 examiner's lack of prescribing pain medication, the ability of the Veteran to remain in service for an additional 14 months without treatment, and the Veteran's report in 2004 that the onset of his current back pain was in 1995.

The private examiners also did not adequately discuss the level of severity of the Veteran's disability in 2004 (*mild* disc degeneration, *mild* disc bulging, *mild to moderate* canal stenosis, *mild or moderate* foraminal stenosis, *mild* facet arthropathy), more than 40 years after the service. They also failed to adequately discuss the Veteran's age upon diagnosis, his history of smoking, his history of golf, and that the symptoms of intermittent tingling sensation did not begin until approximately 2004, all of which may be pertinent factors in determining the etiology of DDD. (The article excerpt submitted by the Veteran specifically notes that the patient's age may be relevant and should be considered by an examiner.)

The Board has also considered the lay statements of record. The Veteran's spouse, C.N., provided February 2011 correspondence in which she stated that she has known the Veteran since approximately 1973. She reported that during 38 years she had known the Veteran, she has been aware of his bouts of chronic pain and debilitating (incapacitating) back pain. She noted that over time, he has attempted

to join her for morning walks, but here have been many days when he cannot walk far. She also discussed the severity of his disability. The Board acknowledges that the Veteran began complaining of difficulty walking due to back pain in approximately 2008 or 2009 (*See* February 2009, May 2009, and November 2012 VA clinical records) and that he has had back pain since perhaps as early as 1995, and tingling since approximately 2004. However, the Veteran's spouse did not know him in the nine years after separation from service; thus, she cannot attest to continuity of symptoms since service.

The Veteran's stepson, C.T., stated that during the time that he has known the Veteran, he has been aware of the Veteran's back issues. He reported that over the years, the Veteran has not been able to participate in a variety of activities, and has relied on C.T. for help with yard work and small home repairs. He stated that "the pain and resulting interference with his daily activities and our family outings has been present and consistent during 35 years, the time I have known [the Veteran]." C.T. did not know the Veteran in the approximate decade after separation from service, thus, he cannot attest to continuity of symptoms.

The Board also finds that the lay statements as to chronic back pain since 1973 are less than credible given the Veteran's reported onset date of 1995, the Veteran's lack of complaints in the 2002 and 2003 VA clinical records, and the Veteran's May 2003 statement that he was "well" other than occasional headaches.

A Statement from Dr. J. H., dated in October 2014, reflects that prior to the Veteran's flare up of pain symptoms, he generally enjoyed taking daily walks for up to 2.5 miles, but that he is no longer able to engage in his walks due to pain, and that, therefore, depression has ensued. She noted that the Veteran previously enjoyed golfing near his residence, and had expressly chosen a home near a country club golf course to be able to golf. She reported that the Veteran's back pain has prevented him from golfing, and forced him to cancel his country club membership. Dr. J.H.'s opinion as to the current severity of the Veteran's back is not probative as to its etiology.

The Board has also considered the excerpt noted above which details how a spine examination should be undertaken to diagnosis a spine disability. However, the article is for the purposes of examining and diagnosing current back complaints, and does not provide probative evidence of the etiology of the Veteran's current back disability as it relates to an incident in 1962. The Board does not dispute that the Veteran has a current spine disability.

In sum, the Board finds that the Veteran had acute and transitory back pain in service, and that his current back pain is not causally related to, or aggravated by, active service. The Board acknowledges that the Veteran is competent to report pain. However, the Board finds that any contention by the Veteran that he has chronic back pain since service is less than credible when considered with the record as a whole. Notably, the earliest clinical evidence of back complaints is in 2004, at which time, the Veteran reported the onset as having been nine years earlier. The absence of any corroborating medical evidence supporting assertions, in and of itself, does not render lay statements incredible, such absence is for consideration in determining credibility. *See Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006) (noting that the absence of contemporaneous medical documentation may go to the credibility and weight of appellant's lay testimony, but the lack of such evidence does not, in and of itself, render the lay testimony incredible). *See also Jandreau v. Nicholson*, 492 F. 3d 1372 (Fed. Cir. 2007) (noting that lay evidence can be competent to establish a diagnosis when . . . a layperson is competent to identify the medical condition.) In the present case, not only is there a lack of clinical records, but the Veteran himself initially reported the onset as more than 30 years after separation from service.

The Veteran has not been shown to have the experience, training, or education necessary to make a competent etiology opinion as to his claimed disability. Although lay persons are competent to provide opinions on some medical issues, the Board finds that a lay person is not competent to etiology findings between acute and transitory back pain in service and the onset of a disability decades later. The Board finds that such etiology findings fall outside the realm of common knowledge of a lay person. *See Kahana v. Shinseki*, 24 Vet. App. 428, 435 (2011).

Moreover, the Board finds that the VA opinions are more probative than those of lay persons.

The Board has considered the doctrine of giving the benefit of the doubt to the appellant, under 38 U.S.C.A. § 5107, and 38 C.F.R. § 3.102, but does not find that the evidence is of such approximate balance as to warrant its application. *Gilbert v. Derwinski*, 1 Vet. App. 49, 54-56 (1990).

ORDER

Entitlement to service connection for degenerative disc disease of the lumbar spine is denied.

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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).