



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

IN THE APPEAL OF
FRAZIER FOREMAN

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DOCKET NO. 05-21 232

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DATE *August 5, 2015*

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

THE ISSUES

1. Entitlement to service connection for a bilateral foot disability, to include peripheral neuropathy.
2. Entitlement to an initial rating in excess of 50 percent for posttraumatic stress disorder (PTSD).
3. Entitlement to an effective date earlier than March 22, 2011, for the grant of service connection for PTSD.

ATTORNEY FOR THE BOARD

Jarrette A. Marley, Counsel

INTRODUCTION

The Veteran served on active duty from August 1970 to August 1972.

These matters are before the Board of Veterans' Appeals (Board) on appeal from May 2006 and December 2012 rating decisions by the Waco, Texas Department of Veterans Affairs (VA) Regional Office (RO) that, in part, granted service connection for PTSD, rated 50 percent, effective March 22, 2011.

The case was originally before the Board in February 2008 when the Board remanded entitlement to service connection for a bilateral foot disability. In a November 2009 decision, the Board denied entitlement to service connection for a bilateral foot disability. The Veteran appealed the Board's decision to the United States Court of Appeals for Veterans Claims (Court). In a June 2011 Memorandum Decision, the Court vacated the Board's November 2009 decision, and remanded the case for compliance with the terms of the Memorandum Decision. In April 2012, the Board again remanded entitlement to service connection for a bilateral foot disability.

The issues of entitlement to service connection for a bilateral foot disability and an initial increased rating for PTSD, are addressed in the REMAND portion of the decision below and are REMANDED to the Agency of Original Jurisdiction (AOJ).

FINDING OF FACT

The Veteran met all eligibility criteria for the liberalized benefit of entitlement to service connection for PTSD on July 13, 2010, the effective date of a liberalizing law issued by VA.

CONCLUSION OF LAW

The criteria for an effective date of July 13, 2010, for the award of service connection for PTSD are met. 38 U.S.C.A. §§ 1154(a), 5107(b), 5110 (West 2014); 38 C.F.R. §§ 3.102, 3.114, 3.304(f), 3.400 (2014).

REASONS AND BASES FOR FINDING AND CONCLUSION

Regulations provide that, generally, the effective date of an evaluation and award based on an original claim will be the date of receipt of the claim or the date entitlement arose, whichever is the later. 38 C.F.R. § 3.400. Further, 38 C.F.R. § 3.114 provides that, where compensation is awarded pursuant to a liberalizing law, the effective date of such award shall be fixed in accordance with the facts found, but shall not be earlier than the effective date of the act.

The Veteran's claim for service connection for PTSD was received in September 2008.

Post-service VA treatment records include positive PTSD screening tests and diagnoses of PTSD. *See, e.g.*, April 2005 VA treatment record; June 2006 VA treatment record. In December 2008 correspondence, the Veteran stated that he saw dead bodies while stationed in Vietnam.

On September 2010 VA PTSD examination, the Veteran reported that he saw a lot of dead bodies being picked up and returned to the base camp for processing multiple times during his service in Vietnam. He further indicated he believed he could have been physically injured and that he felt horrified during his service in Vietnam and with the reported stressor. The examiner diagnosed anxiety disorder, not otherwise specified, and found that the Veteran did not meet the criteria for PTSD, noting (erroneously) that the Veteran felt no fear of hostile military or terrorist activity.

On March 22, 2011 VA PTSD examiner, the Veteran again reported seeing dead bodies during his service in Vietnam. The examiner found that the Veteran experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others, and the Veteran's response involved intense fear, helplessness, or horror. Based on the Veteran's reported stressor, the examiner diagnosed PTSD.

In a November 2012 rating decision, the Veteran was granted service connection for PTSD pursuant to the liberalized regulations governing service connection for PTSD, effective March 22, 2011 (date of VA examination).

In this case, effective July 13, 2010, VA amended its adjudication regulation at 38 C.F.R. § 3.304(f) governing service connection for PTSD by liberalizing, in certain circumstances, the evidentiary standard for establishing the required in-service stressor. The Veteran's award of entitlement to service connection for PTSD was granted pursuant to this liberalizing law. Resolving all reasonable doubt in the Veteran's favor, the Board finds that the evidence shows the Veteran met all eligibility criteria continuously since July 13, 2010. Therefore, the Board finds that the Veteran is entitled to an earlier effective date of July 13, 2010 for service connection for PTSD.

ORDER

An effective date of July 13, 2010, but no earlier, for the grant of service connection for PTSD is granted, subject to the applicable regulations concerning the payment of monetary benefits.

REMAND

Regarding the Veteran's claim for service connection for a bilateral foot disability, to include peripheral neuropathy, in April 2012, the Board remanded the matter to determine the nature and etiology of any foot disabilities, and to address direct and secondary theories of service connection.

On April 2012 VA feet examination, it was noted that the Veteran has been receiving VA treatment for foot calluses and hammer toes for several years, and that he has had hallux valgus. It was noted that the Veteran's peripheral neuropathy was not diagnosed until 2004, and opined that it was more likely than not, not secondarily caused by his service connected conditions. In an October 2014 VA addendum opinion, it was opined that there was no nexus between the Veteran's in-service foot diagnoses/conditions/sprain and current hammer toes as there is no anatomic or pathophysiologic relationship. Unfortunately, it is not clear whether or not the Veteran has or has had hallux valgus during the appeal period, and the examiner did not provide an opinion as to the etiology of the Veteran's hallux valgus. *See McClain v. Nicholson*, 21 Vet. App. 319, 321 (2007) (the requirement of having a current disability is met "when a claimant has a disability at the time a claim for VA disability compensation is filed or during the pendency of that claim"). In addition, the opinions did not make clear whether the identified conditions may be considered to have been aggravated by his service-connected disabilities. *See El-Amin v. Shinseki*, 26 Vet. App. 136, 140-41 (2013). Accordingly, this matter must be remanded to determine the likely etiology of the disabilities. *Stegall v. West*, 11 Vet. App. 268, 271 (1998).

In addition, in the December 2012 rating decision on appeal, the RO granted service connection for PTSD, rated 50 percent, effective March 22, 2011. In December 2012 correspondence, the Veteran expressed disagreement with the initial rating awarded for his PTSD. The RO has not yet issued the Veteran a Statement of the Case (SOC) with respect to this issue. Under the circumstances, the Board has no discretion and is obliged to remand this issue to the RO for the issuance of a SOC. *See Manlincon v. West*, 12 Vet. App. 238, 240-41 (1999); *Holland v. Gober*, 10 Vet. App. 433, 436 (1997).

Finally, any pertinent VA treatment records should be associated with the claims folder. *See 38 C.F.R. § 3.159(c)(2)*; *Bell v. Derwinski*, 2 Vet. App. 611 (1992).

Accordingly, the case is REMANDED for the following action:

1. Provide the Veteran a Statement of the Case (SOC) addressing the claim of entitlement to an initial increased rating for PTSD. Advise him of the date on which the time allowed for perfecting a timely Substantive Appeal for this claim expires. If he submits a timely Substantive Appeal, then return the claim to the Board for further appellate consideration.
2. The RO should associate with the claims file updated VA treatment records since May 2012.
3. After associating any pertinent, outstanding records with the file, refer the record to a person with appropriate expertise, or schedule an examination should that become indicated, to obtain an opinion,
 - (a) whether peripheral neuropathy has been *aggravated* by any service connected disability;
 - (b) whether hammer toes was *caused* or *aggravated* by service connected disability; and
 - (c) to clarify if the Veteran has hallux valgus and if so, whether it is related to any foot complaints noted in service, and/or was *caused* or *aggravated* by service connected disability.

The Veteran's service connected disability include lumbosacral strain, PTSD, tinea versicolor of trunk and arms, bilateral leg radiculopathy, residuals of fracture of metacarpal right ring finger. Aggravation is defined for these purposes as a worsening of the underlying condition versus a temporary flare-up of symptoms.

A detailed rationale for any opinion expressed should be provided. If an opinion cannot be rendered without resorting to speculation, that should be explained.

4. Then readjudicate the matters on appeal. If the benefits sought on appeal remain denied, the Veteran should be issued a supplemental statement of the case and given a reasonable opportunity to respond.

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

This claim must be afforded expeditious treatment. The law requires that all claims that are remanded by the Board of Veterans' Appeals or by the United States Court of Appeals for Veterans Claims for additional development or other appropriate action must be handled in an expeditious manner. *See* 38 U.S.C.A. §§ 5109B, 7112 (West 2014).

MICHAEL E. KILCOYNE
Veterans Law Judge, Board of Veterans' Appeals

IN THE APPEAL OF
FRAZIER FOREMAN

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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 (855) 446-9678.

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 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 General Counsel. *See* 38 C.F.R. 14.636(i); 14.637(d).