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

IN THE APPEAL OF
PHILIP G. WILSON

[redacted]

DOCKET NO. 14-05 536) DATE *January 29, 2016*
) *CMT*
)

On appeal from the
Department of Veterans Affairs Regional Office in Boise, Idaho

THE ISSUES

1. Entitlement to separate disability ratings for service-connected sleep apnea, chronic bronchitis, asthma, chronic obstructive pulmonary disease, and allergic bronchospasms.

2. Entitlement to an initial disability rating in excess of 50 percent for sleep apnea.

REPRESENTATION

Appellant represented by: The American Legion

WITNESS AT HEARING ON APPEAL

Veteran

ATTORNEY FOR THE BOARD

J.A. Williams, Associate Counsel

INTRODUCTION

The Veteran served on active duty from May 1979 to May 1981.

This matter is before the Board of Veterans' Appeals (Board) on appeal from a January 2013 rating decision of the Boise, Idaho Department of Veterans Affairs (VA) Regional Office (RO) which granted service connection for sleep apnea effective August 31, 2012 but assigned a single 50 percent disability rating which encompassed the newly service-connected sleep apnea and previously service-connected chronic bronchitis, asthma, chronic obstructive pulmonary disease (COPD), and allergic bronchospasms.

The Veteran filed a Notice of Disagreement (NOD) in January 2013 disagreeing with the RO's discontinuation of his prior 30 percent disability rating for chronic bronchitis, asthma, chronic obstructive pulmonary disease, and allergic bronchospasms and requested he be assigned both the 50 percent rating for his sleep apnea and the 30 percent rating for his other respiratory disabilities. He did not disagree with the effective date. A Statement of the Case (SOC) was issued in January 2014, and a VA Form 9 was received in February 2014. The RO issued a Supplemental SOC (SSOC) in July 2014.

The Veteran testified before the undersigned Veterans Law Judge during a video conference hearing in October 2015. A transcript of the hearing has been associated with the Veteran's claims file. At the hearing, the Veteran submitted additional evidence. Section 501 of the Honoring America's Veterans Act, Public Law No. 112-154, 126 Stat. 1165 provides for an automatic waiver of initial Agency of Original Jurisdiction (AOJ) review for substantive appeals filed on or after February 2013 unless the claimant or his representative requests AOJ consideration in writing. 38 U.S.C.A. § 7105(e). As the Veteran's Substantive Appeal was received

in February 2014 and the Veteran has not requested AOJ consideration, the additional evidence is subject to initial review by the Board.

FINDINGS OF FACT

1. The Veteran is service-connected for sleep apnea, chronic bronchitis, asthma, chronic obstructive pulmonary disease, and allergic bronchospasms.

2. Disabilities due to sleep apnea are rated in accordance with the criteria under 38 C.F.R. § 4.97, Diagnostic Code (DC) 6847, and disabilities due to chronic bronchitis, asthma, chronic obstructive pulmonary disease, and allergic bronchospasms are rated under DC 6604-6602.

3. The Veteran's service connection for sleep apnea, chronic bronchitis, asthma, chronic obstructive pulmonary disease, and allergic bronchospasms are rated under a single 50 percent disability rating that is assigned pursuant to the criteria under DC 6847.

4. The controlling laws and regulations do not permit the assignment of separate disability ratings for disabilities that are rated under DC 6604-6602 and DC 6847.

5. The Veteran's sleep apnea has required the use of a CPAP machine, however, has not resulted in any respiratory failure, carbon dioxide retention, cor pulmonae, or tracheostomy.

CONCLUSIONS OF LAW

1. Separate disability ratings for sleep apnea, chronic bronchitis, asthma, chronic obstructive pulmonary disease, and allergic bronchospasms are not warranted. 38 U.S.C.A. §§ 1155, 5103, 5103A, 5107 (West 2014); 38 C.F.R. §§ 4.14 , 4.96, 4.97, Diagnostic Codes 6604-6602 & 6847 (2015).

2. The criteria for an initial disability rating in excess of 50 percent for sleep apnea are not met. 38 U.S.C.A. §§ 1155, 5107 (West 2014); 38 C.F.R. §§ 3.321 , 4.1, 4.3, 4.7, 4.96, 4.97, Diagnostic Code 6847 (2015).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

I. VA's Duty to Notify and Assist

The Veteran's 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) (2015).

Regarding the Veteran's claim for increased ratings, as the rating decision on appeal granted service connection and assigned a disability rating and effective date for the award, statutory notice has served its purpose, and its application was no longer required. *See Dingess/Hartman v. Nicholson*, 19 Vet. App. 473 (2006), *aff'd, Hartman v. Nicholson*, 483 F.3d 1311 (Fed. Cir. 2007). A January 2014 SOC provided notice to the Veteran on the "downstream" issue of entitlement to an increased rating, while a July 2014 Supplemental SOC (SSOC) reajudicated the matter after the Veteran and his representative responded and further development was completed.

Regarding VA's duty to assist, the Board finds that all relevant facts have been properly developed and that all evidence necessary for equitable resolution of the issue decided herein has been obtained. The Veteran's service treatment records (STRs) were obtained along with all identified and available post-service treatment records. Records from the Social Security Administration and the Veteran's statements in support of the claim are also of record. After a careful review of such statements, the Board has concluded that the Veteran has not identified any pertinent evidence that remains outstanding.

Also, the Veteran was afforded VA medical examinations in March 2011, April 2011, and December 2012 in connection with this claim. The Board finds these examinations adequate because they were based upon consideration of the Veteran's pertinent medical history, his lay assertions and current complaints, and because they describe the claimed disabilities in sufficient detail to allow the Board to make a fully informed determination. *See Barr v. Nicholson*, 21 Vet. App. 303 (2007) (noting that VA must provide an examination that is adequate for rating purposes).

Finally, the Veteran testified during a video conference hearing in October 2015. At the hearing, the undersigned explained the issues on appeal, asked questions focused on the elements necessary to substantiate the claims, and sought to identify any further development that was required. These actions satisfied the Veterans Law Judge's duty to explain fully the issues and to suggest the submission of evidence that may have been overlooked. *See Bryant v. Shinseki*, 23 Vet. App. 488, 492 (2010). In sum, VA's duty to assist has been met and the Board will address the merits of the claim.

II. Legal Criteria, Factual Background, and Analysis

Laws and Regulations

Disability evaluations are determined by the application of the VA's Schedule for Rating Disabilities (Rating Schedule), 38 C.F.R. Part 4. The percentage ratings in the Rating Schedule represent, as far as can be practicably determined, the average impairment in earning capacity resulting from diseases and injuries incurred or aggravated during military service and their residual conditions in civil occupations. 38 U.S.C.A. § 1155; 38 C.F.R. § 4.1. The assignment of a particular Diagnostic Code depends wholly on the facts of the particular case. *Butts v. Brown*, 5 Vet. App. 532, 538 (1993).

The Veteran is presumed to be seeking the maximum possible evaluation. *AB v. Brown*, 6 Vet. App. 35 (1993). When a question arises as to which of two ratings applies under a particular code, the higher rating is assigned if the disability more closely approximates the criteria for the higher rating. 38 C.F.R. § 4.7. At the time

of an initial rating, separate ratings can be assigned for separate periods of time based on the facts found – a practice known as "staged" ratings. *Fenderson v. West*, 12 Vet. App. 119 (1999).

Where functional loss due to pain on motion is alleged, 38 C.F.R. §§ 4.40 and 4.45 must be considered. *DeLuca v. Brown*, 8 Vet. App. 202, 207-08 (1995). A finding of functional loss due to pain must be supported by adequate pathology, and evidenced by the visible behavior of the claimant. *Johnston v. Brown*, 10 Vet. App. 80, 85 (1997). The evaluation of the same disability under various diagnoses, known as "pyramiding," is to be avoided. 38 C.F.R. § 4.14.

The Board notes that it 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 its decision, there is no need to discuss, in detail, every piece of evidence of record. *Gonzales v. West*, 218 F.3d 1378, 1380-81 (Fed. Cir. 2000) (VA must review the entire record, but does not have to discuss each piece of evidence). Hence, the Board will summarize the relevant evidence as appropriate and the Board's analysis will focus specifically on what the evidence shows, or fails to show, as to the claims.

Analysis

The Veteran has contended in numerous submissions and during his Board hearing that 38 C.F.R. § 4.96(a) should be read to allow separate ratings for sleep apnea, chronic bronchitis, asthma, chronic obstructive pulmonary disease, and allergic bronchospasms. In support, he cites the plain language of the regulation, which he believes precludes rating different respiratory disorders under a single evaluation. *See* October 2015 Hearing Transcript. In support of his assertion, the Veteran submitted a previous Board decision involving a different Veteran. Of note, previous Board decisions are not binding on the Board, unless the previous Board decision(s) specifically addressed this particular Veteran's case. *See* 38 C.F.R. § 20.1303 (2015); *McDowell v. Shinseki*, 23 Vet. App. 207, 228 (2009).

The controlling portion of 38 C.F.R. § 4.96(a) states, "Rating coexisting respiratory conditions. Ratings under diagnostic codes 6600 through 6817 **and** 6822 through

6847 **will not be combined with each other**. Where there is lung or pleural involvement, rating under diagnostic codes 6819 and 6820 will not be combined with each other or with diagnostic code 6600 through 6817 or 6822 through 6847. **A single rating will be assigned under the diagnostic code which reflects the predominant disability with elevation to the next higher evaluation where the severity of the overall disability warrants such elevation**. . . ."
38 C.F.R. § 4.96(a) (emphasis added).

In addressing the Veteran's interpretation of this regulatory provision, and which diagnostic code ratings may not be combined with other diagnostic code ratings, the Board notes that absent an expressly defined term within a statute, "a fundamental canon of statutory construction is that when interpreting a statute, the words of a statute are given 'their ordinary, contemporary, common meaning.' " *See Gordon v. Nicholson*, 21 Vet. App. 270, 277 (2007). The canons of statutory construction apply to regulations as well as statutes. *See Smith (William) v. Brown*, 35 F.3d 1516, 1522 (Fed. Cir. 1994).

Mindful of the foregoing, as highlighted by the Board in its emphasis of the word "and" as used in the language of 38 C.F.R. § 4.96(a), the regulation actually states in the conjunctive that, "[r]atings under diagnostic codes 6600 through 6817 and 6822 through 6847 will not be combined with each other." Hence, the Veteran's reading that the regulation expresses those conditions in the disjunctive is mistaken. Indeed, a plain reading of the language under 38 C.F.R. § 4.96(a) gives no indication of any alteration or limitation of the express language quoted above. Under the circumstances, the Board sees no merit in the Veteran's assertion that the conditions expressed under 38 C.F.R. § 4.96(a) are expressed in the disjunctive.

The Veteran also argues that the manifestations of sleep apnea and his other respiratory illnesses, specifically COPD, are not duplicative or overlapping; hence, he argues that the assignment of separate disability ratings for each would not constitute "pyramiding," which is forbidden under 38 CFR § 4.14. In that regard, the Veteran states that sleep apnea and COPD have "separate and distinctly different outcomes associated with their individual medical outcomes. The asthma/COPD element has attacks of the bronchi, allergic bronchospasms, particle

allergic reaction in the lungs, obstruction of the lungs and more. [However], obstructive [sleep] apnea is caused from involuntary closure of the throat muscles, caused by the tongue resting against the back of the throat, and central [sleep] apnea is a condition resultant from an action of the brain." *See* July 2013 Correspondence.

The Veteran further argues that his sleep apnea diagnoses falls under sleep disorders and is not a pulmonary disorder such as COPD. He argues they are independent medical conditions and his COPD affects him all day while his sleep apnea impacts him at night. *See* October 2015 Hearing Transcript. He also submitted a study completed by the National Institute of Health describing COPD and sleep apnea as separate disorders and stating that an individual with COPD had increased predisposition for sleep apnea. In sum, the Veteran argues that since the two disabilities are the result of distinct medical etiologies and present symptoms that do not overlap, he is entitled to separate disability ratings for each disability.

To the extent that the Veteran has asserted that the assignment of separate disability ratings under Diagnostic Code 6604-6602 and 6847 would not amount to impermissible pyramiding because sleep apnea and COPD present with distinct manifestations, such argument is unavailing. The Board recognizes that the evidence of record supports a finding that sleep apnea and COPD present distinct manifestations. That notwithstanding, the Board is bound by 38 C.F.R. § 4.96(a), which specifically prohibits the assignment of separate evaluations for COPD (and his other service-connected respiratory disabilities) and sleep apnea.

The Veteran also contends that VA failed to comply with rating reduction procedures outlined in 38 C.F.R. 3.105(e)-(i). The Board finds Section 3.105 does not apply in this case. The regulation speaks specifically to when the reduction in evaluation of a service-connected disability is considered warranted and a lower evaluation would result in a **reduction or discontinuance of compensation payments currently being made**. *Id*. (emphasis added). A reduction in evaluation is not synonymous with a reduction in compensation. Accordingly, reduction in evaluation with no corresponding reduction in compensation does not meet the criteria of 3.105. VAOGCPREC 71-91 (November 7, 1991) ("38 C.F.R. § 3.105(e) does not apply where there is no reduction in the amount of compensation payable.

It is only applicable where there is both a reduction in evaluation and a reduction or discontinuance of compensation payable.").

Here, the Veteran was assigned a 30 percent disability rating for his asthma effective February 7, 2011. In August 2012, the Veteran filed a separate claim for entitlement to service connection for sleep apnea and was granted a 50 percent disability rating. As the regulations require that the Veteran be compensated only for the predominant disability, the Veteran's compensation was not reduced. The change in the diagnostic code did not equate to a severance of service connection for his other previously service-connected respiratory disabilities. *See* 38 C.F.R. § 4.96. Therefore, the Veteran's argument must fail.

The Board is sympathetic to the Veteran's assertions. Nonetheless, given the binding nature of the applicable statutory and regulatory provisions recited above, the Board has no option but to conclude that separate disability ratings for the Veteran's obstructive sleep apnea and asthma may not be assigned. In this regard the Board does not have the authority to grant the Veteran's claim on an equitable basis, and instead is constrained to follow the specific provisions of the controlling law and regulations. *See* 38 U.S.C.A. § 7104 (West 2014); *Taylor v. West*, 11 Vet. App. 436, 440-41 (1998); *Harvey v. Brown*, 6 Vet. App. 416, 425 (1994). As the law is dispositive, the claim must be denied because of the lack of legal entitlement under the law. *Sabonis v. Brown*, 6 Vet. App. 426, 429-30 (1994).

The Board has also considered whether there is evidence suggestive of a higher disability rating. The Veteran's sleep apnea is evaluated under the provisions of 38 C.F.R. § 4.97, DC 6847. Under DC 6847, sleep apnea that requires the use of a breathing assistance device such as a CPAP machine warrants the assignment of a 50 percent disability rating. Where sleep apnea is manifested by chronic respiratory failure with carbon dioxide retention or cor pulmonae, or requires a tracheotomy, a maximum 100 percent disability rating is assigned.

The December 2012 VA medical examination report shows that the Veteran's sleep apnea has required the use of a CPAP machine. However the evidence does not show that the Veteran's sleep apnea has resulted in any respiratory failure, carbon

dioxide retention, cor pulmonale, or tracheotomy. As such, the criteria for the maximum 100 percent rating under DC 6847 have not been met. Accordingly, a rating in excess of 50 percent for sleep apnea is not warranted.

Other Considerations

The Board has also considered the applicability of other potentially applicable diagnostic criteria for rating the Veteran's sleep apnea, chronic bronchitis, asthma, chronic obstructive pulmonary disease, and allergic bronchospasms but finds that no higher rating is assignable under any other diagnostic code. *See* 38 C.F.R. §§ 4.96, 4.97. Further, the Board finds that the clinical evidence for the entire appeal period does not show distinct time periods exhibiting symptoms warranting any additional "staged" ratings. *See Hart*, 21 Vet. App. at 509-10.

The Board has also considered the provisions of 38 C.F.R. § 3.321(b)(1) , which govern the assignment of extra-schedular disability ratings. However, the Board finds that the record does not show that the Veteran's disability is so exceptional or unusual as to warrant the assignment of a higher rating on an extra-schedular basis. *See* 38 C.F.R. § 3.321(b)(1) (2012).

The threshold factor for extra-schedular consideration is a finding that the evidence before VA presents such an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate. *See Thun v. Peake*, 22 Vet. App. 111 (2008). In this regard, there must be a comparison between the level of severity and symptomatology of the claimant's service-connected disability with the established criteria found in the rating schedule for that disability. If the criteria reasonably describe the claimant's disability level and symptomatology, then the claimant's disability picture is contemplated by the rating schedule and the assigned schedular evaluation is therefore adequate, and no extra-schedular referral is required. *Id.* Otherwise, if the schedular evaluation does not contemplate the claimant's level of disability and symptomatology and is found inadequate, VA must determine whether the claimant's exceptional disability picture exhibits other related factors, such as those provided by the extra-schedular

regulation as "governing norms," which include marked interference with employment and frequent periods of hospitalization.

Here, the evidence does not present an exceptional disability picture that renders inadequate the available schedular ratings under DC 6847 for the Veteran's sleep apnea. The Veteran reports trouble sleeping and breathing as well as choking and gasping at night. A comparison between the level of severity and symptomatology of the Veteran's assigned rating with the established criteria found in the rating schedule shows that the rating criteria reasonably describe the Veteran's disability level and symptomatology. As discussed above, a rating higher than the 50 percent disability rating already assigned is available under the applicable rating criteria, but the Veteran's disability has not been productive of such manifestations. As such, it cannot be said that the available schedular ratings for the Veteran's disability are inadequate.

Based on the foregoing, the Board finds that the requirements for an extra-schedular evaluation for the Veteran's service-connected sleep apnea, under the provisions of 38 C.F.R. § 3.321(b)(1), have not been met. *Bagwell v. Brown*, 9 Vet. App. 337 (1996); *Shipwash v. Brown*, 8 Vet. App. 218 (1995); *Thun*, 22 Vet. App. 111.

Additionally, the Board notes that under *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014), a Veteran may be awarded an extraschedular rating based upon the combined effect of multiple conditions in an exceptional circumstance where the evaluation of the individual conditions fails to capture all the service-connected disabilities experienced. However, in this case, even after applying the benefit of the doubt under *Mittleider v. West*, 11 Vet. App. 181 (1998), there are no additional symptoms that have not been attributed to a specific service-connected condition. Accordingly, this is not an exceptional circumstance in which extraschedular consideration may be required to compensate the Veteran for a disability that can be attributed only to the combined effect of multiple conditions. Thus, referral for assignment of an extraschedular evaluation in this case is not in order. *Floyd v. Brown*, 9 Vet. App. 88, 95 (1996); *Bagwell v. Brown*, 9 Vet. App. 337 (1996).

A total rating for compensation based on individual unemployability (TDIU) is an element of all appeals of an initial rating. *Rice v. Shinseki*, 22 Vet. App. 447 (2009). Entitlement to TDIU is raised where a Veteran: (1) submits evidence of a medical disability; (2) makes a claim for the highest rating possible; and (3) submits evidence of unemployability. *Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001). However, TDIU is not raised in an increased rating claim unless the *Roberson* requirements are met. *Jackson v. Shinseki*, 587 F.3d 1106 (Fed. Cir. 2009). There is no evidence of unemployability due to the service-connected sleep apnea, hence further consideration of TDIU is not warranted.

In sum, there is no basis for a higher evaluation for the Veteran's service-connected sleep apnea, and the regulations do not permit assignment of separate evaluations for each disorder. In reaching the above decision, the Board considered the doctrine of reasonable doubt; however, as the preponderance of the evidence is against the Veteran's claim for an initial disability rating in excess of 50 percent for sleep apnea, the doctrine does not apply. *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

ORDER

Entitlement to separate disability ratings for service-connected sleep apnea, chronic bronchitis, asthma, chronic obstructive pulmonary disease, and allergic bronchospasms is denied.

Entitlement to an initial disability rating in excess of 50 percent is denied.

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DEBORAH W. SINGLETON
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

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).