



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

IN THE APPEAL OF
ROBERT WILKES

SS [REDACTED]

DOCKET NO. 15-32 977

)
)
)

DATE *May 5, 2016*
CML

On appeal from the
Department of Veterans Affairs Regional Office in Pittsburgh, Pennsylvania

THE ISSUES

1. Whether new and material evidence has been received to reopen a claim for entitlement to service connection for a left ankle disorder.
2. Whether new and material evidence has been received to reopen a claim for entitlement to service connection for bilateral pes planus.
3. Whether new and material evidence has been received to reopen a claim for entitlement to service connection for sleep apnea.
4. Entitlement to service connection for sleep apnea.

REPRESENTATION

Appellant represented by: The American Legion

ATTORNEY FOR THE BOARD

D. M. Donahue Boushehri, Counsel

INTRODUCTION

The Veteran served on active duty from March 1986 to March 1992, May 1998 to September 1999, September 2006 to June 2007, and September 2008 to January 2009. He had a verified period of active duty for training from August 1982 to December 1982, along with additional periods of inactive and active duty for training with the Army National Guard.

This case comes before the Board of Veterans Appeals (Board) on appeal from a July 2014 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Pittsburgh, Pennsylvania.

In a September 2015 substantive appeal, the Veteran requested a Board hearing in Washington, D.C. However, he subsequently withdrew the hearing request as indicated by his representative in a statement dated in March 2016.

The issue of entitlement to service connection for sleep apnea is addressed in the REMAND portion of the decision below and is REMANDED to the Agency of Original Jurisdiction (AOJ).

This appeal has been advanced on the Board's docket pursuant to 38 C.F.R. § 20.900(c) (2015). 38 U.S.C.A. § 7107(a)(2) (West 2014).

FINDINGS OF FACT

1. In a July 2013 VA rating decision, claims of entitlement to service connection for left ankle, pes planus, and sleep apnea, were denied.

2. The Veteran appealed the determinations; however, in a December 2013 statement, the Veteran specifically withdrew his appeal.
3. For the claims for left ankle and pes planus disorders, the evidence received since the July 2014 VA rating decision, is cumulative or redundant and does not raise the possibility of substantiating the claims.
4. For the claim for sleep apnea, the evidence received since the July 2013 VA rating decision is not cumulative or redundant of the evidence previously of record and is sufficient, when considered by itself or with previous evidence of record, to raise a reasonable possibility of substantiating the claim.

CONCLUSIONS OF LAW

1. The July 2013 VA rating decision, denying entitlement to service connection for a left ankle disorder, pes planus, and sleep apnea, is final. 38 U.S.C.A. § 7105(b), (d) (West 2014); 38 C.F.R. §§ 3.104, 20.204, 20.302, 20.1103 (2015).
2. New and material evidence has not been received since the July 2013 VA rating decision to reopen a claim for service connection for a left ankle disorder. 38 U.S.C.A. § 5108 (West 2014); 38 C.F.R. §§ 3.156, 3.103, 3.303 (2015).
3. New and material evidence has not been received since the July 2013 VA rating decision to reopen a claim for service connection for pes planus. 38 U.S.C.A. § 5108 (West 2014); 38 C.F.R. §§ 3.156, 3.103, 3.303 (2015).
4. New and material evidence has been received since the July 2013 VA rating decision to reopen a claim for service connection for sleep apnea. 38 U.S.C.A. § 5108 (West 2014); 38 C.F.R. §§ 3.156, 3.103, 3.303 (2015).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

Duty to Assist

The requirements of 38 U.S.C.A. §§ 5103 and 5103A have been met. There is no issue as to providing an appropriate application form or completeness of the application. VA notified the Veteran in June 2014 of the information and evidence needed to substantiate and complete a claim, to include notice of what part of that evidence is to be provided by the claimant, what part VA will attempt to obtain, and how disability ratings and effective dates are determined.

VA fulfilled its duty to assist the Veteran in obtaining identified and available evidence needed to substantiate claims to include where warranted by law, and affording the claimant a hearing before the Board. There is no evidence that additional records have yet to be requested.

Analysis

In the July 2013 VA rating decision, service connection for a left ankle disorder was denied because no left ankle condition was shown in the service treatment records. The claim for service connection for bilateral flat feet was denied because, although there was evidence of a diagnosis of pes planus during the Veteran's last period of service, the disorder was incurred during a period of inactive duty. The claim for entitlement to service connection for sleep apnea was denied as sleep apnea was not diagnosed until after separation from service, and there was no evidence of a respiratory disorder in service or evidence that it was related to service.

The Veteran appealed the decision by filing a notice of disagreement; however, in a December 2013 statement, the Veteran specifically withdrew his notice of disagreement. Therefore, the July 2013 VA rating decision is final. *See* 38 U.S.C.A. § 7105(b), (d); 38 C.F.R. §§ 20.204, 20.302, 20.1103.

The additional relevant evidence received since the July 2013 VA rating decision includes VA treatment records dated from April 2013 to July 2015; an August 2013 statement by the Veteran's wife; and additional statements from the Veteran.

With regard to the application to reopen claims for left ankle and pes planus disorders, the Board finds the evidence does not support the reopening of these claims. While these records are new, they are not material because do not relate to an unestablished fact necessary to substantiate the claims for left ankle and pes planus disorders. Specifically, the VA treatment records show ongoing complaints and treatment and diagnosis for the already-established current disabilities of a left ankle disorder and pes planus. In an August 2013 statement, the Veteran alleged his pes planus disorder was worsened a result of physical training in service. To the extent that this assertion is offered as a new theory in the case, merely presenting a new legal theory of entitlement is not new and material evidence. *See Ashford v. Brown*, 10 Vet. App. 120, 123 (1997). However, the Veteran's lay statements do not provide a nexus between a current left ankle disorder or pes planus and service. As such, the evidence is not new and material.

As a result, the Board finds that the newly received evidence does not relate to an unestablished fact necessary to substantiate the claims on appeal, thus is not new and material and these claims are not reopened. 38 U.S.C.A. § 5108; 38 C.F.R. § 3.156(a).

Until the Veteran meets is threshold burden of submitting new and material evidence sufficient to reopen his claims of entitlement to service connection for a left ankle disorder and pes planus, the benefit of the doubt doctrine does not apply. *See Annoni v. Brown*, 5 Vet. App. 463, 467 (1993).

With regard to the application to reopen a claim for sleep apnea, the Board finds the evidence is sufficient to reopen the claim. In an August 2013 statement, the Veteran's wife asserted that the Veteran has snored since 1997. The Board finds that the Veteran's statement is 'new' because it was not before the AOJ in July 2013. The Board also finds that the new evidence is 'material.' The Board finds that this additional evidence is 'material' as this new testimonial statement indicates

the Veteran's symptoms may have started in service. Again, lay statements such as these are generally presumed to be credible when determining whether to reopen a claim. The August 2013 statement raises the possibility that the Veteran has sleep apnea incurred in service. The Board accordingly finds that new and material evidence has been received to reopen the claim. Hence, the appeal to this extent is granted, and the claim is now subject to review based on the entire evidentiary record.

ORDER

New and material evidence has not been received to reopen a claim for entitlement to service connection for a left ankle disorder; the appeal is denied.

New and material evidence has not been received to reopen a claim for entitlement to service connection for bilateral pes planus; the appeal is denied.

New and material evidence has been received to reopen a claim for entitlement to service connection for sleep apnea; to this extent only, the appeal is granted.

REMAND

As the claim for service connection for sleep apnea has been reopened, the Board finds a VA examination is necessary to determine whether his sleep apnea was incurred in or otherwise related to active service.

Accordingly, the case is REMANDED for the following action:

1. Request that the Veteran identify all medical care providers who treated the Veteran for sleep apnea and whose records have not been obtained and added to the claims file. After securing the necessary release(s), the AOJ should obtain these records.

Any records obtained as a result of such efforts should be associated with the claims file. If such efforts yield negative results, a notation to that effect should be inserted in the file. The Veteran and his representative are to be notified of unsuccessful efforts in this regard, in order to allow the Veteran the opportunity to obtain and submit those records for VA review.

2. Arrange for the Veteran to undergo a VA sleep apnea examination. The Veteran's VA claims file must be made available to the examiner prior to the examination. After examination of the Veteran and review of the record, the examiner is requested to provide an opinion, with complete rationale, as to whether it is at least as likely as not (50 percent probability or higher) that any current sleep apnea was incurred in or is otherwise related to active duty or a period of active duty for training.

The examiner should indicate in his/her report that the Veteran's electronic claims file was reviewed. Any and all studies, tests and evaluations deemed necessary by the examiner should be performed. A rationale for all opinions expressed should be provided and should include a discussion of the Veteran's documented medical history, the relevant facts of this case, and the lay assertions of record including those of the Veteran.

3. Thereafter, undertake any indicated additional development deemed necessary after review of the additional evidence obtained pursuant to this remand. Then, readjudicate the issue on appeal. If the benefit sought on appeal remains denied, the Veteran and his representative should be provided with a Supplemental

Statement of the Case (SSOC) and be afforded a reasonable opportunity to respond. The case should then be returned to the Board for further appellate review, if otherwise in order.

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

This claim must be afforded expeditious treatment. The law requires that all claims 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).

S. L. Kennedy
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.cave.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).