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

IN THE APPEAL OF [redacted]
BENITO R. CHAVEZ

DOCKET NO. 13-29 338) DATE *May 17, 2016*
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On appeal from the
Department of Veterans Affairs Regional Office in Denver, Colorado

THE ISSUES

1. Whether new and material evidence has been received to reopen a claim for service connection for bilateral hearing loss and, if so, whether the claim should be allowed.

2. Whether new and material evidence has been received to reopen a claim for service connection for bilateral tinnitus, and, if so, whether the claim should be allowed.

3. Whether new and material evidence has been received to reopen a claim for service connection for a right knee disorder, to include degenerative joint disease (DJD), and, if so, whether the claim should be allowed.

REPRESENTATION

Appellant represented by: Colorado Division of Veterans Affairs

IN THE APPEAL OF [redacted]
BENITO R. CHAVEZ

WITNESS AT HEARING ON APPEAL

Appellant

ATTORNEY FOR THE BOARD

J. Fussell, Counsel

INTRODUCTION

The Veteran had active service from January to July 1963 and from August 1964 to August 1967. During his second period of service he served in Vietnam. His military occupational specialty was a light weapons infantryman. His awards included the Combat Infantryman Badge, a Parachutist Badge, and the Army Commendation Medal.

This matter comes before the Board of Veterans' Appeals (Board) from a February 2013 decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Denver, Colorado. That decision found that there was new and material evidence since a November 2006 prior rating denial of each of the three claims on appeal and, so, reopened the claims but denied them on a de novo basis.

The Veteran testified before the undersigned Veterans Law Judge (VLJ) at a March 2016 videoconference and a transcript thereof is on file.

This appeal was processed using the Veteran's Benefits Management System (VBMS) and, in addition there is a Virtual VA paperless claims electronic file. Accordingly, any future consideration of this appeal should take into consideration the existence of these electronic records.

FINDINGS OF FACT

1. The Veteran was notified in November 2006 of a rating decision that month which denied service connection for hearing loss, tinnitus, and a right knee disorder, but he did not appeal that decision and it is final.

2. The evidence pertaining to the Veteran's claims for service connection for bilateral hearing loss, bilateral tinnitus, and a right knee disorder, to include DJD, submitted subsequent to the November 2006 rating decision constitutes new and material evidence sufficient to reopen the claims.

3. The Veteran served in combat in Vietnam during the Vietnam Conflict.

4. Chronic bilateral hearing loss, including sensorineural hearing loss, was first demonstrated many years after active service and is not related to any disease, injury, or incident of service.

5. Chronic bilateral tinnitus was first demonstrated many years after active service and is not related to any disease, injury, or incident of service.

6. A chronic right knee disorder, including DJD, was first demonstrated many years after active service and is not related to any disease, injury, or incident of service.

CONCLUSIONS OF LAW

1. The November 2006 rating decision that denied service connection for hearing loss, tinnitus, and a right knee disorder is final. 38 U.S.C.A. § 7105 (West 2002); 38 C.F.R. § 20.1103 (2015).

2. New and material evidence has been submitted to reopen the claims for service connection for bilateral hearing loss, tinnitus, and a right knee disorder, to include DJD. 38 U.S.C.A. § 5108 (West 2002); 38 C.F.R. § 3.156 (2015).

3. The criteria for service connection for bilateral hearing loss are not met. 38 U.S.C.A. §§ 1110, 1112, 1131, 1154(b), 5107(b) (West 2002); 38 C.F.R. §§ 3.102, 3.303, 3.304(d), 3.307, 3.309, 3.385 (2015).

4. The criteria for service connection for bilateral tinnitus are not met. 38 U.S.C.A. §§ 1110, 1131, 1154(b), 5107(b) (West 2002); 38 C.F.R. §§ 3.102, 3.303, 3.304(d) (2015).

5. The criteria for service connection for a right knee disorder, to include DJD, are not met. 38 U.S.C.A. §§ 1110, 1112, 1131, 1154(b), 5107(b) (West 2002); 38 C.F.R. §§ 3.102, 3.303, 3.304(d), 3.307, 3.309 (2015).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

Duties to Notify and Assist

As to all three claims for service connection, by letter in January 2013 the RO satisfied its duty under the Veterans Claims Assistance Act of 2000 (VCAA) to notify the Veteran under 38 U.S.C.A. § 5103(a) and 38 C.F.R. § 3.159(b). Specifically, he was notified of the information and evidence necessary to substantiate the claims for service connection; information and evidence that VA would seek to provide; and that which he was to provide. *Pelegrini v. Principi*, 18 Vet. App. 112, 120 (2004); *Mayfield v. Nicholson*, 20 Vet. App. 537 (2006) (*Mayfield III*), citing *Mayfield II*, 444 F.3d at 1333-34. They also notified him of the way initial disability ratings and effective dates are established. *Dingess/Hartman v. Nicholson*, 19 Vet. App. 473 (2006).

Previously, in providing VCAA required notice information as to the reason or reasons for a prior denial, i.e., which element or elements were was not previously substantiated. *Kent v. Nicholson*, 20 Vet. App. 1 (2006). However, VAOPGCPREC 6-2014 determined that the VCAA only requires claim-specific notice and not case-specific notice, i.e., there is no requirement to provide notice of the reason or reasons for the prior denial.

38 C.F.R. § 3.103(c)(2) requires that a presiding VLJ fully explain the issues and suggest the submission of evidence that may have been overlooked. *See Bryant v. Shinseki*, 23 Vet. App. 488 (2010). The Board videoconference focused on the elements necessary for claim substantiation and the Veteran, via testimony, demonstrated actual knowledge of the elements necessary for claim substantiation. While assistance is required, 38 C.F.R. § 3.103(c)(2) does not require that one presiding at a hearing pre-adjudicate a claim. *Bryant v. Shinseki*, 23 Vet. App. 488, 496 (2010) (per curiam). Moreover, in this case there is no allegation of any deficiency with respect to the 2016 videoconference, much less any violation of the duties set forth in 38 C.F.R. § 3.103(c)(2). Furthermore, additional evidence was submitted at that hearing, together with a waiver of initial RO consideration of that evidence.

The record in this case consists of the Veteran's service treatment and personnel records, as well as private, VA outpatient treatment (VAOPT), and Vet Center treatment records.

Under the duty to assist a VA medical examination or medical opinion is not authorized unless new and material evidence is presented. 38 C.F.R. § 3.159(c)(4)(iii). With respect to the duty to assist mandated by the VCAA because the Board finds that new and material evidence has been submitted to reopen all three claims for service connection, the duty to assist includes providing VA nexus examinations.

Here, the Veteran was afforded VA examinations in this case addressing the etiology of his hearing loss, tinnitus, and right knee DJD. *McLendon v. Nicholson*, 20 Vet. App. 79 (2006); *Wells v. Principi*, 326 F.3d 1381 (Fed. Cir. 2003). 38 U.S.C.A. § 5103A(d)(2); 38 C.F.R. § 3.159(c)(4)(i). The Board may assume the competence of VA examiners and the adequacy of a VA medical opinion unless either is challenged. Here, the adequacy of the examination and medical opinions are not challenged. *See Sickels v. Shinseki*, 643 F.3d 1362, 1366 (Fed. Cir. 2011); *Bastien v. Shinseki*, 599 F.3d 1301, 1307 (Fed.Cir. 2010). Moreover, the

VA examination reports are accepted as adequate because they collectively provide evidentiary information that speaks directly to the Veteran's subjective complaints, the objective findings found on evaluation, and a medical opinion. 38 C.F.R. § 3.326.

As there is neither an indication that the Veteran was unaware of what was needed for claim substantiation nor any indication of the existence of additional evidence for claim substantiation, the Board concludes that there has been full VCAA compliance.

Law and Regulations

To establish service connection, the record must contain: (1) medical evidence of a current disorder; (2) medical evidence, or in certain circumstances, lay testimony, of in- service incurrence or aggravation of an injury or disease; and, (3) medical evidence of a nexus between the current disorder and the in-service disease or injury. In other words, entitlement to service connection for a particular disorder requires evidence of the existence of a current disorder and evidence that the disorder resulted from a disease or injury incurred in or aggravated during service. 38 U.S.C.A. § 1110, 1131; 38 C.F.R. § 3.303(a). Service connection may also be granted for a disease first diagnosed after discharge when all of the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d).

A rebuttable presumption of service connection exists for chronic diseases, specifically listed at 38 C.F.R. § 3.309(a) (and not merely diseases which are "medically chronic"), including a sensorineural hearing loss and arthritis, if the chronicity is either shown as such in service which requires sufficient combination of manifestations for disease identification and sufficient observation to establish chronicity (as opposed to isolated findings or a mere diagnosis including the word 'chronic'), or manifests to 10 percent or more within one year of service discharge (under § 3.307). If not shown as chronic during service or if a diagnosis of chronicity is legitimately questioned, continuity of symptomatology after service is required, 38 C.F.R. § 3.303(b), but the use of continuity of symptoms is limited to

only those diseases listed at 38 C.F.R. § 3.309(a) and does not apply to other disabilities which might be considered chronic from a medical standpoint. The presumption may be rebutted by affirmative evidence of intercurrent injury or disease which is a recognized cause of a chronic disability. 38 U.S.C.A. §§ 1101, 1112, 1113 (West 2002); 38 C.F.R. §§ 3.303(b), 3.307(a)(3), 3.309(a). *Walker v. Shinseki*, 708 F.3d 1331, 1338 (Fed.Cir. 2013), *overruling Savage v. Gober*, 10 Vet. App. 488, 495-96 (1997). For a chronic disease to be shown during service or in a presumptive period means that it is "well diagnosed beyond question" or "beyond legitimate question." *Walker v. Shinseki*, 708 F.3d 1331 (Fed. Cir. 2013).

Service connection may be established under 38 C.F.R. § 3.303(b) by evidence of (a) a chronic disease shown as such in service (or within an applicable presumptive period under 38 C.F.R. § 3.307) which requires (i) a sufficient combination of manifestations for disease identification, and (ii) sufficient observation to establish chronicity at the time, as distinguished from merely isolated findings or a diagnosis including the word "chronic" and (iii) subsequent manifestations of the same chronic disease, or (b) if chronicity in service in not established, as above, by evidence of continuity of symptomatology which requires that (i) a condition was 'noted' during service, and (ii) evidence of postservice continuity of the same symptomatology, and (iii) medical or lay evidence of a nexus between the present disability and the postservice symptomatology." *See Barr v. Nicholson*, 21 Vet. App. 303, 307 (2007).

However, the United States Court of Appeals for the Federal Circuit has held that the provisions of 38 C.F.R. § 3.303(b) relating to continuity of symptomatology can be applied only in cases involving those conditions explicitly recognized as chronic under 38 C.F.R. § 3.309(a). *Walker v. Shinseki*, 708 F.3d 1331 (Fed. Cir. 2013).

38 C.F.R. § 3.385 provides that for the purposes of applying the laws administered by VA, impaired hearing will be considered to be a disability when: (1) the auditory threshold in any of the frequencies 500, 1000, 2000, 3000, 4000 Hertz is 40 decibels or greater; or (2) when the auditory thresholds for at least three of the frequencies 500, 1000, 2000, 3000, or 4000 Hertz are 26 decibels or greater; or (3) when speech recognition scores using the Maryland CNC Test are less than 94 percent.

The competence, credibility, and probative (relative) weight of evidence, including lay evidence must be assessed. *See generally* 38 U.S.C.A. § 1154(a). Lay evidence can be competent and sufficient to establish a diagnosis when a layperson (1) is competent to identify the unique and readily identifiable features of a medical condition; or, (2) is reporting a contemporaneous medical diagnosis; or, (3) describes symptoms at the time which supports a later diagnosis by a medical professional. *See Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007); *see also Layno v. Brown*, 6 Vet. App. 465, 469 (1994); and 38 C.F.R. § 3.159(a)(2). However, a lay person is not competent to provide evidence as to more complex medical questions. *See Woehlaert v. Nicholson*, 21 Vet. App. 456 (2007). *See* 38 C.F.R. § 3.159(a)(1). Likewise, mere conclusory or generalized lay statements that a service event or illness caused a current disability are insufficient. *Waters v. Shinseki*, 601 F.3d 1274, 1278 (2010).

Any competent lay evidence must be weighed to make a credibility determination as to whether it supports a finding of service incurrence; or, if applicable, continuity of symptomatology; or both. *See Barr v. Nicholson*, 21 Vet. App. 303 (2007); *see also Layno v. Brown*, 6 Vet. App. 465 (1994). The credibility of lay evidence may not be refuted solely by the absence of corroborating contemporaneous medical evidence, but it is a factor. *Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed.Cir. 2009). VA may rely on an absence of an entry in a record as evidence that the event did not occur, but only if the matter is of the kind that ordinarily would have been recorded. *Buczynski v. Shinseki*, 24 Vet. App. 221, 224 (2011); *see also Maxson v. Gober*, 230 F.3d 1330, 1333 (Fed. Cir. 2000) ("[E]vidence of a prolonged period without medical complaint can be considered") and *Fagan v. Shinseki*, 573 F.3d 1282, 1289 (Fed. Cir. 2009) (taking into account the lack of treatment or complaints of the condition for an extensive period of time); *see also Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 305 (2008) (more probative weight to VA opinions which relied, *inter alia*, on a record showing disability symptoms did not begin until decades after service).

Moreover, consideration may also be given to the earliest medical records stating when symptoms began or when treatment for symptom first began, or both. Other

credibility factors are the lapse of time in recollecting events attested to, prior conflicting statements opposing consistency with other statements and evidence, internal consistency, facial plausibility, bias, interest, the length of time between alleged incurrence of disability and the earliest or first corroborating medical or lay evidence thereof, and statements given during treatment (which are usually given greater probative weight, particularly if close in time to the onset thereof).

Reasonable doubt will be favorably resolved and it exists when there is an approximate balance of positive and negative evidence. It is a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. 38 U.S.C.A. § 5107(b); 38 C.F.R. § 3.102. If the Board determines that the preponderance of the evidence is against the claim, it has necessarily found that the evidence is not in approximate balance, and the benefit of the doubt rule is not applicable. *Ortiz v. Principi*, 274 F.3d 1361, 1365 (Fed.Cir. 2001).

Background

The Veteran's claims for service connection for bilateral hearing loss, bilateral tinnitus, and residuals of an inservice right knee injury were originally denied in November 2006 and, although the Veteran was notified of that decision by letter in that same month he did not appeal that decision.

No new STRs have been received. 38 C.F.R. § 3.156(c). Also, no new and relevant clinical or other records, including VA treatment records, were received within one year of the notice of the November 2006 RO denial. As a result, that RO's decision became final. 38 U.S.C.A. §§ 7105; 38 C.F.R. §§ 3.156(b) and (c), 20.200, 20.201, 20.302, 20.1103. Accordingly, and regardless of a determination by the RO as to reopening, the claim may now be considered on the merits only if the Board finds that new and material evidence has been received since the prior adjudication. 38 U.S.C.A. § 5108; 38 C.F.R. § 3.156(a); *Jackson v. Principi*, 265 F.3d 1366 (Fed. Cir. 2001).

In November 2012 the Veteran applied to reopen these claims.

For claims to reopen filed on or after August 29, 2001—such as the Veteran's—evidence is considered "new" if it was not previously submitted to agency decision makers. "Material" evidence is existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. "New and material evidence" can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim. 38 C.F.R. § 3.156(a). In determining whether evidence is new and material, the "credibility of the evidence is to be presumed." *Justus v. Principi*, 3 Vet. App. 510, 513 (1992).

The determination of whether newly submitted evidence raises a "reasonable possibility of substantiating the claim" should be considered a component of what constitutes new and material evidence, rather than a separate determination to be made after the Board has found that evidence is new and material. *See Shade v. Shinseki*, 24 Vet. App. 110 (2010). New evidence is that which would raise a reasonable possibility of substantiating the claim if, when considered with the old evidence, it would at least trigger VA's duty to assist by providing a medical opinion. *Id.*

VA will not provide a VA nexus examination in the reopening context but will if the claim is reopened. 38 C.F.R. § 3.159(c)(4). However, this does not mean that a claimant must submit a medical nexus opinion to reopen a claim which was denied based in part on an absence of medical nexus evidence. Rather, lay evidence which is new and material could trigger VA's duty to assist to obtain a medical opinion or consideration of a new theory. Thus, new and material evidence is that which raises the likely entitlement to a nexus medical examination (not service connection) if the claim were to be reopened.

Evidence Previously On File

On the Veteran's November 1962 examination for enlistment in the Army Reserves the Veteran's audiometric testing revealed the following threshold levels, in decibels:

Hertz	500	1,000	2,000	3,000	4,000	Discrimination Ability
Right Ear	10 (25)	5 (15)	5 (15)	Not tested	80 (85)	Not tested
Left Ear	10 (25)	5 (15)	5 (150	Not tested	65 (70)	Not tested

(Prior to October 31, 1967, service department audiometric tests & VA audiometric tests prior to June 30, 1966 were in "ASA" units. The figures in parentheses represent the conversion to the current "ISO" units, which is the standard used in 38 C.F.R. § 3.385.)

The Veteran's hearing of the whispered and spoken voice was 15/15 in each ear. It was noted that he had bilateral defective hearing and he was given a Hearing Profile of "H3."

The service treatment records (STRs) of the Veteran's first period of service are negative for complaints, history, signs, symptoms or treatment for hearing loss, tinnitus, or right knee disability.

On the Veteran's June 1963 examination for discharge from his first period of service he was not afforded audiometric testing but his hearing of the spoken voice was 15/15. He was given a hearing profile of "H1." He had no relevant complaint in an adjunct medical history questionnaire.

On the Veteran's August 1964 examination for entrance into his second period of service audiometric testing revealed the following threshold levels, in decibels:

Hertz	500	1,000	2,000	3,000	4,000	Discrimination Ability
Right Ear	0 (15)	0 (10)	0 (10)	0 (10)	0 (5)	Not tested
Left Ear	5 (20)	0 (10)	0 (10)	0 (10)	0 (5)	Not tested

He was given a Hearing Profile of "H1."

During his second period of service the Veteran was seen in January 1965 for mid-back pain of several years duration.

On the Veteran's July 1967 examination for separation from his second period of service the Veteran's audiometric testing revealed the following threshold levels, in decibels:

Hertz	500	1,000	2,000	3,000	4,000	Discrimination Ability
Right Ear	5 (20)	5 (15)	0 (10)	Not tested	15 (20)	
Left Ear	0 (15)	0 (10)	0 (10)	Not tested	15 (20)	

The Veteran was given a Hearing Profile of "H1." In an adjunct medical history questionnaire the Veteran reported not having or having had a hearing loss.

The Veteran began receiving VA education benefits in 1968.

A report of audiometric testing in January 2005 from the Longmont Hearing Center shows, in graph format, the following threshold levels, in decibels:

Hertz	500	1,000	2,000	3,000	4,000	Discrimination Ability
Right Ear	15	15	55	80	90	92 percent
Left Ear	20	20	45	95	85	92 percent

It was reported that the Veteran had tried hearing aids in the past but had returned them. There was no significant change (i.e., no change greater than 15 dbs.) in hearing sensitivity since the last examination in May 1999, with the exception of a 15 dbs. decrease at 3,000 Hz in the left ear on air conduction testing only (i.e., 80 dbs. in 199). The Veteran's use of bilateral amplification was to be considered.

In VA Form 21-4138, Statement in Support of Claim, in June 2006 the Veteran reported that he was not treated during service for parachuting injuries of his low back, right hip, and right knee. During service he had been around bombings and gunfire.

On VA audiometric testing in October 2006 the Veteran's claim file was reviewed. He reported having had a gradual deterioration of hearing sensitivity since his military service. He had occasional bilateral tinnitus which had begun about 10 years ago. He had a familial history of his brother having had a hearing loss from unknown cause. He had had noise exposure during his military service. He had purchased and tried using hearing aids three years ago. Audiometric testing revealed the following threshold levels, in decibels:

Hertz	500	1,000	2,000	3,000	4,000	Discrimination Ability
Right Ear	20	20	65	75	80	88 percent
Left Ear	25	25	50	90	90	88 percent

The diagnosis was a bilateral sensorineural hearing loss from 1,500 to 8,000 Hz, bilaterally. The Veteran reported having tinnitus three to four times daily, lasting 1 to 5 minutes, which the examiner stated was sufficient for a diagnosis of tinnitus. The examiner noted that the separation audiogram documented normal hearing in both ears. Due to normal hearing found at discharge, the Veteran's current hearing loss and tinnitus were not caused by military noise exposure.

A VA outpatient treatment (VAOPT) in October 2006 noted, in part, that the Veteran had a history of gout, as well as a history of right knee pain from parachuting during service, and borderline diabetes.

Additional Evidence

The evidence received since the November 2006 rating decision includes the following.

VAOPT records in 2009 reflect that the Veteran's medical problems included tinnitus, knee arthralgia, osteoarthrosis, and gout.

A November 17, 2010, VAOPT record shows that the Veteran was trying to lose some weight due to his knee problem.

On VA general medical examination in June 2011 the Veteran's hearing was grossly intact and he was able to hear a normal conversation within the examination area. His gait was within normal limits. There was no functional limitation as to standing and walking.

Private clinical records from 2008 to 2012 show that in July 2008, after X-rays were taken, it was noted that the Veteran had some wear of his right knee and had some early arthritis of the right knee but his function was actually quite good. It was recommended that he had arthroscopic debridement and partial lateral meniscectomy of the right knee. Significantly, a July 7, 2008, clinical notation stated that as to the right knee "[t]he onset of the pain is described as gradual following no specific incident and has been occurring in a persistent pattern for 9 months. The pain has been gradually worsening." He had been told that he had right knee osteoarthritis in the fall of 2007. On December 2, 2011, it was reported that the Veteran related having had the gradual onset of right knee pain over the years and "[t]here has been no injury."

On VA audiology evaluation in February 2013 audiometric testing revealed that the Veteran's threshold levels at the following frequencies were:

Hertz	500	1,000	2,000	3,000	4,000	Discrimination Ability
Right Ear	30	30	65	80	85	76 percent
Left Ear	30	30	60	90	90	74 percent

The tests results were considered to be valid for rating purposes. The diagnosis was a bilateral sensorineural hearing loss. The Veteran's claim file was reviewed.

The examiner stated that based on the Veteran's report and documents in the claim file (DD 214 and/or other documents) the Veteran was exposed to hazardous noise levels while in service. Electronic hearing testing conducted at enlistment and at discharge showed he did not have hearing loss/hearing injury while in service, because there was no significant threshold shift beyond normal variability while during service. Based on electronic hearing testing conducted at enlistment and at discharge it was the examiner's opinion the Veteran's hearing loss and reported tinnitus were less likely as not caused by or a result of noise exposure while in service.

On VA orthopedic examination in February 2013 the Veteran's claim file was reviewed. It was reported that he had a diagnosis of DJD of the knees with pain and limited motion. The first documentation of a right knee condition was in 2008. The Veteran reported that he had had over 40 jumps during service and that he had been evaluated for right knee pain during service, although he admitted that there was no record of this in his STRs. After service, he worked as a physical education teacher for 27 years. He denied an injury to his right knee after service. He stated that he had right knee discomfort since service, but that his right knee didn't really begin to bother him until approximately 2003. He had had several injections in his right knee which help for about 6 months. He had a MRI in 2008 which showed a complex tear of the lateral meniscus with joint effusion. He was given a knee brace in 2010 at the Cheyenne VAMC which he wore when walking. He had it with him at the examination but did not wear it because he drove himself to the appointment.

He had not had any recent physical therapy, but did go to a therapy pool where he exercised in the water twice per week which helped. He has not had any surgery on his right knee. He described instability without falling daily and frequent swelling, but denies locking. He did not take any medication for this condition.

After a physical examination the diagnosis was arthritis of the right knee. It was noted that right knee X-rays at the Cheyenne VAMC documented mild to moderate degenerative changes in the right knee.

The examiner opined that the right knee disorder was less likely than not (less than 50 percent probability) incurred in or caused by the claimed in-service injury, event, or illness. The rationale was that the service records noted that the Veteran received a basic parachutist badge during his active service but were silent, however, for a right knee complaint. He had two periods of service, and both enlistment physicals (11/2/62 and 8/21/64) and both separation physicals (6/21/63 and 7/24/67) were silent for a right knee condition despite the fact that the Veteran filled out questionnaires on all occasions which specifically asked "Have you ever had or have now: swollen or painful joints."

The examiner further stated that the Veteran weighed 130 lbs. at his first enlistment, 170 lbs. on his second separation, and 219 lbs. on today's examination. A clinical record dated 4/24/09 stated that he had a 9 month history of right knee pain. Therefore, it was less likely than not that the Veteran's right knee condition incurred in or was caused by his service as an Infantryman and Parachutist, and more likely due to his 50 lb. weight gain since discharge and his work as a physical education teacher for 27 years.

On VA examination of the Veteran’s ear, including vestibular and infectious conditions, in April 2013 it was reported that the Veteran’s hearing loss had been diagnosed in 1995 and that he had had progressive tinnitus since then.

At the 2016 videoconference the Veteran testified that he had noticed that he had a hearing loss during service because he could not hear dialogue of movies he attended with friends. His hearing acuity worsened during service due to exposure

to gunfire and artillery, including while serving in Vietnam. Pages 4 and 5. He was not exposed to loud noise after service. He had first noticed tinnitus during service. Page 5. His hearing test at service discharge consisted of simply answering a question posed to him. Page 6.

The Veteran testified that he had 43 parachute jumps during service, even though military records indicate that he had only 5 such jumps. Pages 6 and 7. He had injured his low back in one parachute jump, at which time his right hip and right knee were also injured. Page 7. At that time his low back (for which he was now service-connected) and hip hurt worse than the right knee. Page 8. He had not had treatment for his right knee in the immediate postservice years, even though that knee constantly hurt and was sometimes swollen, but he had merely self-medicated with aspirin and application of ice. After service he had been a physical education teacher, teaching from kindergarten up to the 5th grade levels. Page 8. This was not strenuous work and, because of this, he believed that his current right knee condition was not related to his postservice employment. Page 9. The service representative indicated that the Veteran had had a right knee replacement only two (2) weeks earlier). Page 10. Additional evidence was submitted at the videoconference and a waiver of initial consideration of such evidence was submitted. Page 10.

Submitted at the hearing were private clinical record of the Front Range Orthopedics and Spine, Longmont Office, in August and December 2015, as well as January, February, and March 2016 reflecting that the Veteran described the onset of his right knee pain as being gradual and occurring in a persistent pattern for years. He had a right knee replacement in February 2016. Also submitted were postoperative treatment notes and copies of photographs apparently taken in Vietnam.

A March 2013 audiology report of the Longmont Hearing and Tinnitus Center includes the results of audiometric testing which confirms that the Veteran had a bilateral sensorineural hearing loss. It was reported that records of that facility showed that the Veteran had a hearing loss which was documented in January 1995. At the current visit, i.e., March 2013, he reported having tinnitus which had been

ongoing for approximately 3 years. He had a history of noise exposure during military service without hearing protection. He was using hearing aids.

In an April 2013 statement the Veteran reported that he had been exposed to weapons fire during stateside training and in Vietnam when he was also exposed to bomb and mortar fire, all without hearing protection.

Reopening

In *Falzone v. Brown*, 8 Vet. App. 398, 404 (1995) it was held that in rendering assistance in obtaining a VA examination before reopening VA "performed a 'de facto reopening'" of the claim. The Court stated that where there was an application to reopen a claim, because an examination was conducted to determine the nature and severity of the claimed condition, the examination would not have been necessary unless the claim was to be adjudicated on the merits. *Falzone*, at 404. Consequently, having provided the Veteran with the VA nexus examinations in this case, and which yielded opinions which are both new and material, the claims are reopened.

Thus, the additional evidence is new and material for the purpose of reopening the claims and, accordingly, the claims for service connection are reopened.

Bilateral Hearing Loss and Bilateral Tinnitus

For the purposes of applying the laws administered by VA, impaired hearing will be considered to be a disability when the auditory threshold in any of the frequencies 500, 1000, 2000, 3000, 4000 Hertz is 40 decibels or greater; or when the auditory thresholds for at least three of the frequencies 500, 1000, 2000, 3000, or 4000 Hertz are 26 decibels or greater; or when speech recognition scores using the Maryland CNC Test are less than 94 percent. 38 C.F.R. § 3.385.

Based on the evidence of record, the Board finds that service connection for bilateral hearing loss, to include a sensorineural hearing loss, and tinnitus is not warranted. In this regard, the Veteran's STRs are negative for tinnitus and a

diagnosed chronic hearing loss, including sensorineural hearing loss, which is a listed chronic disease at 38 C.F.R. § 3.309(a), i.e., an organic disease of the nervous system. Specifically, the STRs do not confirm that he complained of or was treated for hearing loss or tinnitus.

The Board is aware that the November 1962 audiometric testing upon enlistment into the Army Reserves revealed elevated thresholds at 4,000 Hz in each ear, by reason of which it was reported that the Veteran had bilateral defective hearing and was given a Hearing Profile of "H3." Under "H" a "1" is assigned if the decibel level at 4000 Hz does not exceed 40. Appendix (App'x) VIII to Para. 9-3(b), AR 40-501. *McKinney v. McDonald*, No. 13-2273, slip op. at 3 (U.S. Vet.App. March 11, 2016) (panel decision).

However, while the Veteran was not afforded audiometric testing at discharge from his first period of service, he was given a hearing profile of "H1." More to the point, audiometric testing on entrance into his second period of active duty revealed threshold levels that were within normal limits at all relevant frequencies and, as with audiometric testing at discharge from his second period of service, the Veteran did not have a hearing loss by VA standards. In other words, the isolated elevated thresholds on enlistment into the reserves in 1962, and not during active duty, was never confirmed by subsequent audiometric testing during either period of active service.

In *Hensley v. Brown*, 5 Vet. App. 155, 159 (1993) the Court stated that:

> [Applicable VA regulations do] not preclude service connection for a current hearing disability where hearing was within normal limits on audiometric testing at separation from service. . . . Therefore, when audiometric test results at a veteran's separation from service do not meet the regulatory requirements for establishing a "disability" at that time, he or she may nevertheless establish service connection for a current hearing disability by submitting evidence that the current disability is causally related to service.

Id. at 159-60.

The holding in *Hensley* was that VA may not use audiometric tests from a claimant's separation examination as a per se legal bar on proving service connection. In *Hensley*, inservice audiometric testing yielded elevated thresholds at some frequencies and, so, the Court found that even if audiometric testing at service separation did not met the requirements of 38 C.F.R. § 3.385 (establishing hearing loss by VA standards) the service connection claim could not be denied solely on that basis. Rather, if there were any current hearing loss (by VA standards) it had to be determined whether shifts in auditory thresholds during service represented the onset of any current hearing loss (even if first diagnosed a number of years after service).

However, the holding in *Hensley*, *Id*., places no limitation on the results of inservice audiometric tests being used by medical examiners to reach an opinion, even a negative opinion, and does not hold that VA must disregard an otherwise adequate medical opinion (even if a postservice examiner found audiometric results etiologically relevant). *See Gruen v. Shinseki*, No. 09-3603, slip op. (U.S. Vet. App. May 16, 2011) (nonprecedential unpublished memorandum decision); Slip Copy, 2011 WL 1837395 (Table) (Vet.App.) (noting that the Board had conceded inservice exposure to acoustic trauma and the claimant currently had a hearing loss by VA standards). More to the point, in this case the audiometric testing conducted at the time of the Veteran's service entrance into and separation from his second period of active duty, did not in the opinion of any VA examiner reflect a shift in auditory thresholds at any relevant frequency in either ear.

Moreover, a fair reading of the VA audiology opinions in this case reflects that the audiologists were not positing a belief that service connection is unavailable when a veteran leaves service with normal hearing (which would contravene *Hensley*). Rather, the VA audiologists stated that a noise induced hearing loss had not been shown to manifest until years after the offending inservice noise had ceased. Such a statement, rendered by an audiologist, does not contravene *Hensley*.

"The American Medical Association defines 'acoustic trauma' as '[a] severe injury to the ear caused by a short-duration sound of extremely high intensity such as an explosion or gunfire.' American Medical Association Complete Medical Encyclopedia 112 (Jerrold B. Leiken, M.D., & Martin S. Lipsky, M.D., eds., 2003). An acoustic trauma can cause permanent hearing loss, but does not necessarily do so. *Id.*" *Reeves v. Shinseki*, No. 2011-7085, slip op. at 10, footnote 7 (June 14, 2012 Fed. Cir.) (not selected for publication); 2012 WL 2105624 (C.A. Fed.).

The Board concedes that the Veteran was exposed to acoustic trauma in combat during service. However, this is not necessarily the same as having sustained the type of injury that causes chronic hearing loss and tinnitus, and having resulting chronic disability. In other words, even though he was exposed to acoustic trauma during service, this does not automatically mean there were chronic residuals, including a sensorineural hearing loss and tinnitus, which were caused thereby. The Veteran and his representative have not pointed to any such statutory or regulatory presumption to this effect, and the Board is aware of none. Thus, while not disagreeing that the Veteran sustained acoustic trauma, under the circumstances which he has related, the Board rejects the notion that his current hearing loss, including a sensorineural hearing loss, and tinnitus should be conceded as being due to inservice acoustic trauma. As to this, 38 U.S.C.A. § 1154(b) provides that in the case of a combat veteran lay or other evidence of service incurrence or aggravation is sufficient proof of the occurrence of an event but this deals with what happened during service and not the questions of either the existence of current disability or a nexus to service. *Davidson v. Shinseki*, 581 F.3d 1313, 1315 (Fed.Cir. 2009) (finding that 38 U.S.C.A. § 1154(b) does not require controlling weight be given to testimony as to the cause of a combat veteran's death); *see also* 38 C.F.R. § 3.304(d).

Significantly, the Veteran did not reported having or having had disability or symptoms indicative of chronic hearing loss or tinnitus in a medical history questionnaire at service separation and at the time of his separation examination, clinical evaluation of his ears and audiometric testing were negative. In short, the audiometric testing at both service entrance and at service separation did not meet VA criteria for the presence of hearing loss. The Veteran's pre-separation physical

examination and questionnaire are particularly probative both as to the Veteran's subjective reports and the resulting objective findings. These examination reports were generated with a view towards ascertaining the Veteran's then-state of physical fitness and are akin to statements of diagnosis or treatment. *Rucker v. Brown*, 10 Vet. App. 67, 73 (1997).

The February 2013 VA examiner found that there was no significant threshold shift beyond normal variability during the Veteran second period of service. That examiner opined that the claimed hearing loss and tinnitus were less likely as not caused by inservice noise exposure. In this regard, a report of a March 2013 private audiology evaluation and an April 2013 VA evaluation both observed that the Veteran's hearing loss was first documented and diagnosed in 1995 and that tinnitus had occurred only since that time. This tends to corroborate the opinion of the February 2013 VA examiner.

The Veteran's earliest contemporaneous attempts to link hearing loss and tinnitus to inservice acoustic trauma do not antedate filing is claim in 2005, a time approaching almost four decades after his 1967 discharge from his second, and last, period of active service.

As to any more recent clinical evidence reflecting that the Veteran relates his current hearing loss and tinnitus to acoustic trauma during military service and continuous hearing loss and tinnitus thereafter, these records do no more than repeat the substance of the Veteran's statements and testimony on file. Because any such recorded histories, even if recorded by medical personnel, add no other comment, observation, diagnosis or conclusion of a medical nature they are merely repetitive in that they simply repeat the Veteran's current allegations. As such, these records have no significant probative value above that of the Veteran's lay statements. In other words, a bare transcription of a lay history is not transformed into 'competent medical evidence' merely because the transcriber happens to be a medical professional. *See LeShore v. Brown*, 8 Vet. App. 406, 409 (1995) (where a history recorded by an examiner had not filtered, enhanced, or added medico-evidentiary value to the lay history through medical expertise). Moreover, any contention that he has had tinnitus since military service contrasts with the history he related at the

2006 VA examination when he reported having had tinnitus which began about 10 years earlier, i.e., approximately 1996 and shortly after he was first seen for and diagnosed with a hearing loss. This is a time almost 30 years after his last period of military service. Therefore, the Veteran's statements regarding alleged continuity of symptomatology are inconsistent with the contemporaneous medical records, and the Board finds the Veteran's own lay statements and testimony are thus not consistent and, so, are not credible.

Moreover, the Board finds it significant that the Veteran had not filed a claim for service connection for hearing loss and tinnitus until 2005, almost four decades after military service. Since he was well aware of potential entitlement to VA benefits when he received VA education benefits as early as 1968, it would be reasonable to expected that if he had had a hearing loss or tinnitus, or noticed deceased hearing acuity or tinnitus in 1968, that he would at that time have filed claims for service connection for the disorders. However, he did not and this suggests that he did not have or believe that he had a hearing loss or tinnitus at that time. Moreover, he has not proffered any reason for not having filed claims for service connection for hearing loss and tinnitus when received VA education benefits in 1968.

The Board is cognizant that while the lack of contemporaneous medical records may be a fact that the Board can consider and weigh against a claimant's lay evidence, the lack of such records does not, in and of itself, render lay evidence not credible. *Buchanan v. Nicholson,* 451 F.3d 1331, 1337 (2006). The Board, however, finds in the instant case that the combination of the lack of treatment for hearing loss and tinnitus during service; audiometric testing at service discharge from his second period of service which found no elevated threshold levels at any relevant frequency in either ear; his not having complained of hearing loss or tinnitus at service discharge; his not having sought treatment or disability compensation for hearing loss or tinnitus immediately after service; the fact that his post-service clinical records are negative for any findings of a hearing loss, including sensorineural hearing loss or tinnitus for many years after his service discharge, to be persuasive evidence against his claims.

Generally the absence of evidence of contemporaneous complaints or treatment for relevant symptoms and disability does not constitute substantive negative evidence to be weighed against a claim. VA may rely on an absence of an entry in a record as evidence that the event did not occur, but only if the matter is of the kind that ordinarily would have been recorded in that record. *Buczynski v. Shinseki*, 24 Vet. App. 221, 224 (2011). Here, if the Veteran had in fact had chronic hearing loss or tinnitus since the inservice acoustic trauma it would be reasonable to expect that he would have claimed these when he first had an opportunity for file a claim for VA disability compensation, such as when he received VA education benefits in 1968. However, he did not. Also, the Federal Circuit held that "'evidence of a prolonged period without medical complaint can be considered' in making a service connection determination." *Maxson v. Gober*, 230 F.3d 1330, 1333 (Fed. Cir. 2000); *see also Fagan v. Shinseki*, 573 F.3d 1282, 1289 (Fed. Cir. 2009); *see also Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 305 (2008) (approving a decision assigning more probative weight to VA opinions which relied, inter alia, on a record revealing that symptoms of the claimed disability did not begin until decades after service and after a productive working life). Moreover, consideration may also be given to the earliest medical records stating when symptoms began or when treatment for symptom first began, or both.

As to the second and third circumstances, delineated in *Jandreau*, *Id*., when lay evidence may establish a diagnosis, the Veteran has not reported or stated that he was given a diagnosis during service of any hearing loss or tinnitus, or a diagnosis within one year of service discharge in 1967 of a sensorineural hearing loss (the 2nd circumstance under *Jandreau*). His statement that he had hearing difficulties or tinnitus even during military service are simply too vague to suggest, much less establish that he was given a formal diagnosis of a hearing loss or tinnitus during either period of active service (the 3rd circumstance under *Jandreau*).

The Veteran may believe that his now chronic hearing loss and tinnitus are related to his active service. As to this, a layperson may speak as to etiology in some limited circumstances in which nexus is obvious merely through lay observation. *See Jandreau*, *Id*. Here, however, the question of causation extends beyond an

immediately observable cause-and-effect relationship and, as such, the Veteran being untrained and uneducated in medicine is not competent to address etiology in the present case. *See Woehlaert v. Nicholson*, 21 Vet. App. 456 (2007) (a claimant is not competent to provide evidence as to more complex medical questions). In fact, the complexity of diagnosing the nature and etiology of the Veteran's current hearing loss and tinnitus is shown by the absence of contemporaneous clinical or lay evidence of each until long after service. In fact, so complex is it that medical opinions had to be obtained. Unfortunately, the medical opinions are negative and do not support the claims. Rather, it is probative evidence against the claims.

Therefore, the Board finds that because the Veteran's chronic hearing loss, including a sensorineural hearing loss, and tinnitus were first manifested several decades after active service and any acoustic trauma therein, and are not related to any disease, injury, or incident of military service, service connection for these disorders is not warranted. Moreover, as indicated previously, because the allegations regarding continuity of symptomatology are not credible, presumptive service connection for a chronic disease, i.e., sensorineural hearing loss, is not warranted.

This being the case, the claims must be denied because the preponderance of the evidence is unfavorable. *See* 38 U.S.C.A. § 5107(b); 38 C.F.R. § 3.102.

Right Knee Disorder, Including DJD

An April 2014 rating decision granted the Veteran service connection for a lumbar strain with osteoarthritis based on the physical exertions of his military service, including parachute jumps.

In this regard, the Veteran was seen during service for back pain. However, by his own admission in 2006 he was not treated for any disability of the right knee during either period of active duty. On the other hand, this is in contradiction to a history he related at the 2013 VA examination when he reported having been treated. As with the claims for service connection for hearing loss and tinnitus, the earliest account by the Veteran attempting to link any right knee disability to military

service does not antedate the filing of his original claim for service connection in 2005, many years after his military service and many years after he was well aware of potential entitlement to VA benefits.

The Veteran has testified that he has continuously had symptoms such as pain in his right knee since he injured that knee in parachute jumps. However, this contradicts the clinical histories recorded in private medical records, such as in 2008 and again in 2011, when he reported having had the gradual onset of right knee pain over the years. Also, at least one of those clinical histories also noted that he had reported not having had any specific injury. At the 2013 VA orthopedic examination the Veteran related that the right knee had not really begun to bother him until about 2003, although he had had right knee discomfort since service which, as he testified, he self-treated with aspirin and application of ice packs.

Weighing against this lay evidence is the opinion of the 2013 VA examiner who opined, after reviewing the evidence, that it was less likely as not that the right knee disorder, which now includes not merely DJD and his right knee replacement, related to military service. The Veteran disagrees with the rationale of the VA examiner that the Veteran engaged in significant exertion as a physical education teacher to children over the years. However, the VA examiner also attributed the pathology of the right knee to the Veteran's weight gain over the years.

The Veteran may believe that his right knee disability is related to his active service and, as noted, as a layperson he may speak as to etiology in some limited circumstances in which nexus is obvious merely through lay observation, here, the question of causation extends beyond an immediately observable cause-and-effect relationship and, as such, the Veteran being untrained and uneducated in medicine is not competent to address etiology in the present case. *See Jandreau, Id*.; *Woehlaert, Id.* In fact, the complexity of diagnosing the nature and etiology of the Veteran's right knee disability is shown by the absence of contemporaneous clinical or lay evidence thereof until long after service. In fact, so complex is it that a medical opinion had to be obtained. Unfortunately, the medical opinion is negative and does not support the claim. Rather, it is probative evidence against the claim.

Therefore, the Board finds that because the Veteran's right knee disability was first manifested several decades after active service and any trauma therein, and is not related to any disease, injury, or incident of military service, service connection is not warranted. This being the case, the claim must be denied because the preponderance of the evidence is unfavorable. *See* 38 U.S.C.A. § 5107(b); 38 C.F.R. § 3.102.

ORDER

New and material evidence having been received, the claims of entitlement to service connection for bilateral hearing loss, tinnitus, and a right knee disorder are reopened; the appeal granted to extent only.

Service connection for bilateral hearing loss, bilateral tinnitus, and a right knee disorder, to include DJD, is denied.

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DEBORAH W. SINGLETON
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 (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).