

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

IN THE APPEAL OF
RAYMOND I. WALKER



DOCKET NO. 12-23 770) DATE *March 15, 2016*
) *CMJ*
)

On appeal from the
Department of Veterans Affairs Regional Office in Montgomery, Alabama

THE ISSUES

1. Entitlement to a disability rating in excess of 30 percent for posttraumatic stress disorder (PTSD) prior to October 5, 2009.
2. Entitlement to a disability rating in excess of 50 percent for PTSD from October 5, 2009.
3. Entitlement to a total disability based on individual unemployability prior to October 5, 2009.
4. Entitlement to a total disability based on individual unemployability from October 5, 2009.

REPRESENTATION

Appellant represented by: Adam Werner, Attorney

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WITNESS AT HEARING ON APPEAL

Appellant

ATTORNEY FOR THE BOARD

Matthew Schlickemaier, Associate Counsel

INTRODUCTION

The Veteran had active duty service from January 1966 to March 1968.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from April 2010 and January 2011 rating decisions issued by the Department of Veterans Affairs (VA) Regional Office (RO) in Montgomery, Alabama.

In August 2015, the Veteran testified at a videoconference hearing before the undersigned. A transcript of the hearing is of record.

This appeal was processed using the Virtual VA and Veterans Benefits Management System (VBMS) paperless claims processing systems. Accordingly, any future consideration of this appellant's case should take into account the existence of these electronic records.

The issues of entitlement to a disability rating in excess of 30 percent for PTSD, and entitlement to a total disability based on individual unemployability each prior to October 5, 2009 are addressed in the REMAND portion of the decision below and are REMANDED to the Agency of Original Jurisdiction (AOJ).

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FINDINGS OF FACT

1. Since October 5, 2009, symptoms of PTSD have not more nearly approximated occupational and social impairment with deficiencies in most areas.
2. Since October 5, 2009, the preponderance of the evidence is against finding that the Veteran has been unable to obtain and maintain substantially gainful employment due solely to his service-connected disabilities.

CONCLUSIONS OF LAW

1. Since October 5, 2009, the criteria for a rating in excess of 50 percent for PTSD have not been met. 38 U.S.C.A. §§ 1155, 5103, 5103A, 5107 (West 2014); 38 C.F.R. §§ 3.102, 3.159, 4.1, 4.2, 4.3, 4.7, 4.130, Diagnostic Code 9411 (2015).
2. Since October 5, 2009, the criteria for a total rating due to unemployability caused by service-connected disabilities have not been met. 38 U.S.C.A. §§ 1155, 5103, 5103A, 5107; 38 C.F.R. §§ 3.102, 3.159, 3.340, 4.1, 4.16 (2015).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

Duties to Notify and 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. In November 2009 and October 2010, VA notified the Veteran of the information and evidence needed to substantiate his claims, to include notice of what part of that evidence is to be provided by the claimant, and notice of what part VA will attempt to obtain.

VA fulfilled its duty to assist the Veteran in obtaining identified and available evidence needed to substantiate a claim, and as warranted by law, affording VA

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examinations. There is no evidence that additional records have yet to be requested, or that additional examinations are in order. Although the Veteran made a generalized statement at the August 2015 hearing that his PTSD symptoms had increased since a September 2013 VA examination, as described in further detail below, the evidence of record, to include July and August 2015 private mental health examination reports submitted by the appellant, indicate that his symptoms have not materially changed. Hence, the Board finds that the record adequately reveals the current state of the appellant's PTSD and a remand for another examination is not warranted. *See Palczewski v. Nicholson*, 21 Vet. App. 174, 183 (2007).

During the August 2015 Board hearing, the undersigned explained the issues on appeal and the appellant was asked questions designed to elicit information or evidence that may have been overlooked to include those pertinent to the claims of entitlement to an increased rating and a total disability based on individual unemployability. These actions provided an opportunity for the Veteran and his representative to introduce material evidence and pertinent arguments, in compliance with 38 C.F.R. § 3.103(c)(2) and consistent with the duty to assist. *See Bryant v. Shinseki*, 23 Vet. App. 488, 492 (2010).

Posttraumatic Stress Disorder

Disability ratings are determined by applying the criteria set forth in the VA Schedule for Rating Disabilities, found in 38 C.F.R. Part 4. The percentage ratings are based on the average impairment of earning capacity as a result of a service-connected disability, and separate diagnostic codes identify the various disabilities and the criteria for specific ratings. 38 U.S.C.A. § 1155; 38 C.F.R. § 4.1.

If two disability evaluations are potentially applicable, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria for that rating; otherwise, the lower rating will be assigned. 38 C.F.R. § 4.7.

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Where, as here, entitlement to compensation has already been established and an increase in the disability rating is at issue, the present level of disability is of primary concern. *Francisco v. Brown*, 7 Vet. App. 55 (1994).

The Veteran's posttraumatic stress disorder is rated under 38 C.F.R. § 4.130, Diagnostic Code 9411. All psychiatric disabilities are evaluated under the General Rating Formula for Mental Disorders (general rating formula). Pursuant to the general rating formula, a 50 percent rating is warranted for occupational and social impairment with reduced reliability and productivity due to such symptoms as: flattened affect; circumstantial, circumlocutory, or stereotyped speech; panic attacks more than once a week; difficulty in understanding complex commands; impairment of short-and long-term memory (e.g. retention of only highly learned material, forgetting to complete tasks); impaired judgment; impaired abstract thinking; disturbances of motivation and mood; difficulty in establishing effective work and social relationships.

A 70 percent rating is warranted when the psychiatric disorder results in occupational and social impairment with deficiencies in most areas such as work, school, family relations, judgment, or mood, due to such symptoms as: suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such an unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a work like setting); and inability to establish and maintain effective relationships.

When determining the appropriate disability evaluation to assign, the Board's primary consideration is the veteran's symptoms, but it must also make findings as to how those symptoms impact the veteran's occupational and social impairment. *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 118 (Fed. Cir. 2013); *Mauerhan v. Principi*, 16 Vet. App. 436, 442 (2002).

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Another factor to take into consideration is the Global Assessment of Functioning scale, which reflects psychological, social, and occupational functioning of a hypothetical continuum of mental health illness. *See Richard v. Brown*, 9 Vet. App. 266, 267 (1996) (citing the *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 1994)). Scores between 41 to 50 reflect serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifter) or any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job). A score of 51 to 60 indicates moderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) or moderate difficulty in social, occupational, or school functioning (e.g., few friends, conflicts with peer or coworkers). Scores between 61 and 70 reflect some mild symptoms (e.g., depressed mood and mild insomnia) or some difficulty in social, occupational, or school functioning (e.g., occasional truancy, or theft within the household), but generally functioning pretty well, with some meaningful interpersonal relationships.

The Veteran claims that his posttraumatic stress disorder symptoms warrant a rating in excess of 50 percent. After having carefully reviewed the evidence of record, the Board disagrees. The reasons follow.

At a January 2010 VA examination, the Veteran reported sleep disruption, irritability and social withdrawal, and that feelings of depression and anxiety had increased since his retirement in March 2009. A VA clinical psychologist estimated that these symptoms, which she attributed to posttraumatic stress disorder only, resulted in only mild occupational impairment. There was only an occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks but he generally functioned satisfactorily. The examiner diagnosed chronic posttraumatic stress disorder and assigned a Global Assessment of Functioning score of 61.

At a January 2011 VA posttraumatic stress disorder examination, a VA psychologist noted that while the Veteran had experienced a number of stressors since November 2009 – including labile hypertension for which he was hospitalized about two months prior, financial pressures, his wife’s medical issues, and progressing hearing deficits – he reported positive relationships with his wife of

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several years and his three adult daughters. The examiner noted that the appellant's symptoms otherwise remained unchanged and opined that he could function independently, manage his financial benefits, and understand instructions. His persisting psychological symptoms affected but did not preclude his ability to recall and follow instructions, attend to tasks for a least two consecutive hours, and interact with supervisors, coworkers, and customers. The appellant continued to live with his common-law wife of several years and they enjoyed a positive relationship. The appellant was noted to enjoy positive relationships with his three adult daughters. The examiner noted that he left his last job in 2008 following an altercation with a supervisor. Significantly, however, the management of the appellant's former employer liked the work performed by the Veteran, and the claimant's struggles at work were related to the one supervisor in question. The examiner assigned a Global Assessment of Functioning score of 57 for chronic posttraumatic stress disorder.

At a September 2013 VA posttraumatic stress disorder examination, the appellant reported anxiety, panic attacks that occurred weekly or less often, and chronic sleep impairment. A VA clinical psychologist described the symptoms as resulting in occupational and social impairment with occasional decreased in work efficiency and intermittent periods of inability to perform occupational tasks although generally functioning satisfactorily with normal routine behavior, self-care and conversation. She added that there was no indication from the Veteran's work history that his symptoms caused significant problems obtaining or maintaining employment. While his symptoms might cause mild occupational impairment, he was not experiencing symptoms that would prevent either sedentary or physical employment. She assigned a Global Assessment of Functioning score of 62 for chronic posttraumatic stress disorder.

At the August 2015 hearing, the Veteran reported difficulty concentrating and staying focused, poor sleep, panic attacks on a "regular basis," as well as feeling moody. He indicated that he believed his symptoms had worsened and reported poor relationships with women since his wife had died. He noted that he had difficulty going to unfamiliar places because it made him feel nervous and afraid.

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After the hearing, in August 2015, the Veteran submitted two private medical examination reports. In the first, dated July 2015, a private clinical psychologist summarized the Veteran's symptoms as moderate to severe posttraumatic stress disorder with associated anxiety and depression, as well as associated mild cognitive dysfunction in certain areas. The examiner noted that the Veteran confined his social activities to his family only, and had to stop work because of his isolation and irritability. The examiner estimated that in the current and prior year, his Global Assessment of Functioning score would have been 50. The examiner, who appears to have reviewed some VA treatment records, added, "It is felt that his impairments are in excess of his current 50 (percent) benefits and he is in fact unemployable" since he cannot gather his thoughts together to complete any task or even listen to a conversation.

In the second examination report, a VA posttraumatic stress disorder Disability Benefits Questionnaire dated August 2015 and filled out by the same private psychologist, the examiner checked boxes indicating that the appellant exhibited depressed mood, anxiety, suspiciousness, panic attacks more than once a week, chronic sleep impairment, short/long term memory impairment, circumstantial/circumlocutory speech, impaired abstract thinking, disturbances motivation/mood, inability to establish maintain effective work/social relationship, and suicidal ideation. Overall, however, the psychologist determined that these symptoms resulted in only occupational and social impairment with reduced reliability and productivity.

The above evidence reflects that the Veteran's symptoms have not more nearly approximated the criteria for a 70 percent rating. While there was sleep impairment, panic attacks, and some anxiety, depression, and social withdrawal, overall his symptoms have not resulted in occupational and social impairment with deficiencies in most areas such as work, school, family relations, judgment, or mood. All VA examiners assessed the Veteran's symptoms as resulting in, at most, occupational and social impairment with reduced reliability and productivity and all assigned Global Assessment of Functioning scores corresponding to, at most, moderate difficulty in social, occupational, or school functioning. While the July 2015 private psychologist assigned a Global Assessment of Functioning score of 50

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– essentially in between serious and moderate impairment – and noted some more severe symptoms such as suicidal ideation, his judgment was that overall, the frequency and severity of those symptoms resulted in occupational and social impairment with only reduced reliability and productivity.

To the extent the Veteran may argue that the private psychologist's conclusion that the 50 percent disability rating is too low supports his claim, the Global Assessment of Functioning scores and an examiner's characterization of the level of impairment are only factors to be considered by the Board in rendering its decision; ultimately, the appropriate disability rating is to be made by the Board in applying the criteria to the evidence as a whole. 38 C.F.R. § 4.2 ("It is the responsibility of the rating specialist to interpret reports of examination ... so that the current rating may accurately reflect the elements of disability present."); VA Adjudication Procedures Manual, pt. III, subpt. iv, ch. 3, § A-9(j) ("Do not request a medical authority to make conclusions of law, which is a responsibility inherent to the rating activity").

As described above, the private psychologist's overall characterization of the level of impairment does not support the legal conclusion he asserts.

As to consideration of referral for an extraschedular rating, such consideration requires a three-step inquiry. *See Thun v. Peake*, 22 Vet. App. 111 (2008), *aff'd sub nom. Thun v. Shinseki*, 572 F.3d 1366 (Fed. Cir. 2009). The first question is whether the schedular rating adequately contemplates the Veteran's disability picture. *Thun*, 22 Vet. App. at 115. If the criteria reasonably describe the claimant's disability level and symptomatology, then the claimant's disability picture is contemplated by the rating schedule, the assigned schedular evaluation is, therefore, adequate, and no referral is required. If the schedular evaluation does not contemplate the claimant's level of disability and symptomatology and is found inadequate, then the second inquiry is whether the claimant's exceptional disability picture exhibits other related factors such as those provided by the regulation as governing norms. If the Veteran's disability picture meets the second inquiry, then the third step is to refer the case to the Under Secretary for Benefits or the Director of the Compensation Service to determine whether an extraschedular rating is warranted.

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The above discussion reflects that the symptoms of the Veteran's posttraumatic stress disorder are fully contemplated by the applicable rating criteria. The criteria include both the symptoms listed and the overall level of impairment. Moreover, as noted, the Court has indicated that the general rating formula requires an analysis of whether the symptoms or others of similar severity, frequency, and duration cause the level of impairment required for the appropriate rating. The Board has thus considered all psychiatric symptoms indicated in lay and medical evidence and not only those listed in the general rating formula; as well as the overall level of impairment. Hence, consideration whether the Veteran's disability picture exhibits other related factors such as those provided by the regulations as "governing norms" is not required. Referral for consideration of an extraschedular rating for posttraumatic stress disorder is therefore not warranted. 38 C.F.R. § 3.321(b)(1).

Finally, 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. In this case, however, even after applying the doctrine of reasonable doubt, there are no additional service-connected disabilities 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.

Total Disability Based on Individual Unemployability

As noted above, the Board is remanding the issue of entitlement to a disability rating in excess of 30 percent for posttraumatic stress disorder prior to October 5, 2009. Since that issue is intertwined with the issue of entitlement to a total disability based on individual unemployability prior to October 5, 2009, the Board will only address the issue of entitlement to a total disability rating based on individual unemployability from October 5, 2009. See *Harris v. Derwinski*, 2 Vet. App. 180, 183 (1991).

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For VA purposes, total disability exists when there is any impairment of mind or body sufficient to render it impossible for the average person to follow a substantially gainful occupation. 38 C.F.R. § 3.340.

Total disability ratings for compensation may be assigned, where the schedular rating is less than total, if a veteran is unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities. 38 C.F.R. § 4.16(a). This regulation provides that consideration of such a rating is warranted if a veteran has one service-connected disability rated 60 percent or more or, if there are two or more such disabilities, there must be at least one that is rated 40 percent or more, with the remaining disabilities combining to 70 percent or more. *Id.*

Here, the Veteran is service connected for posttraumatic stress disorder, rated as 50 percent disabling since October 5, 2009, as well as for tinnitus, rated as 10 percent disabling since August 2012. He is thus not eligible for entitlement to a total disability rating based on individual unemployability on a schedular basis, because there is no single disability rated 60 percent, and the ratings do not combine to 70 percent.

Entitlement to a total disability rating based on individual unemployability is warranted under 38 C.F.R. § 4.16(b) regardless of the veteran's disability ratings where the service connected disabilities alone render him unemployable. The Board cannot grant a total disability rating based on individual unemployability under 38 C.F.R. § 4.16(b) in the first instance, but must consider whether a remand for the AOJ to refer the case to the Under Secretary for Benefits or the Director of Compensation is warranted. *Bowling v. Principi*, 15 Vet. App. 1, 10 (2001). For the following reasons, the Board finds that a remand to refer is not warranted.

In August 2011 and May 2015 applications for a total disability based on individual unemployability, the Veteran claimed that his service-connected PTSD and tinnitus prevented him from working. He most recently worked for a building supply company as a truck driver, a full-time position he held for about six years and which

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ended in March 2009 according to the May 2015 application. He has had two years of college education.

A September 2009 Social Security Administration determination reflects that that agency found the Veteran disabled as of April 2009, primarily due to disorders of muscles, ligament, and fascia. His secondary disability was hypertension. He is not service connected for any these disorders.

As described above, at the January 2010 VA examination, the VA clinical psychologist estimated that the Veteran's posttraumatic stress disorder symptoms resulted in only mild occupational impairment.

In a September 2010 correspondence, the Veteran's former employer indicated that the appellant had worked about 50 hours per week from December 2001 through April 2009, when he decided to retire. The employer indicated that in the twelve months preceding his last day of employment, the Veteran had lost about twelve days of work due to his disability. The employer added that while the Veteran had begun to "slow down, slack off, and sometimes had difficulty in getting along...he was a good man but was ready to retire."

The January 2011 VA psychologist noted that although the Veteran's former management liked his work and he struggled only with specific issues related to a particular supervisor, he quit his job after an altercation with that one person. The examiner opined that the Veteran could function independently, manage his financial benefits, understand instructions, and that his persisting psychological symptoms affected but did not preclude his ability to recall and follow instructions, attend to tasks for a least two consecutive hours, interact with supervisors, coworkers, and customers.

The September 2013 VA clinical psychologist observed that there was no indication from the Veteran's work history that his symptoms caused significant problems obtaining or maintaining employment. She noted that while the appellant's symptoms might cause mild occupational impairment, the Veteran was not experiencing symptoms of posttraumatic stress disorder that would prevent either

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sedentary or physical employment. While he might have difficulty tolerating high amounts of stress, adapting to changes in the workplace or to new tasks, he could probably function adequately in employment situations in which he was his own boss, worked alone, and was not subject to oversight or correction by another individual. She opined that he would likely be able to function better in a job that involved more routine or repeated tasks as well as a job that involved limited supervisory or leadership roles.

The July 2015 private psychologist concluded that the Veteran “is in fact unemployable” since he cannot gather his thoughts together to complete any task or even listen to a conversation but also described the Veteran’s posttraumatic stress disorder symptoms as resulting in only occupational and social impairment with reduced reliability and productivity, with a Global Assessment of Functioning score of 50.

At the August 2015 hearing, the Veteran stated that he took early retirement because he felt that his employer wanted him to leave. He indicated that he believed that he would not be able to work as a Wal-Mart greeter since some of the customers might ignore him which would hurt his feelings.

The above evidence reflects that the service-connected disabilities alone have not rendered the Veteran unable to obtain and maintain substantially gainful employment since October 2009. The evidence shows that the appellant voluntarily decided to stop working – he was not fired – because he felt that his employer wanted him to leave. While his former employer’s statements suggest that his work may not have been exemplary, they do not necessarily indicate that it was so poor that he could not have continued working there. Indeed, he missed only about twelve days in a twelve-month period due to his disability. While the private psychologist concluded that the Veteran was unemployable, he also determined that his posttraumatic stress disorder resulted in only reduced reliability and productivity – a description that consistent with the VA examiners’ assessment of his symptoms who concluded that, at worst, the Veteran’s symptoms would limit him to working alone or as his own boss. Given that the Veteran has two years of college education, such limitations do not appear to be prohibitive of gainful employment.

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Finally, the Social Security Administration's determination that the claimant was entitled to disability benefits was based entirely on non-service connected disabilities. To the extent that the Veteran indicated that his disabilities would preclude him from such employment, the Board finds the opinions of the VA examiners to be of greater probative weight than the Veteran's lay assertions.

Based on the above, the Board finds that the preponderance of the evidence reflects that since October 5, 2009, entitlement to a rating in excess of 50 percent for posttraumatic stress disorder is not warranted, and that the Veteran's service-connected disabilities alone have not precluded him from obtaining and maintaining substantially gainful employment. The benefit of the doubt doctrine is thus not for application and the claims must therefore be denied. 38 U.S.C.A. § 5107(b).

ORDER

Entitlement to a disability rating in excess of 50 percent for posttraumatic stress disorder from October 5, 2009 is denied.

Entitlement to a total disability rating based on individual unemployability from October 5, 2009 is denied.

REMAND

In a correspondence received October 5, 2009, the Veteran stated that he "would like to file for an increase of my [service-connected] PTSD." Significantly, this correspondence was received within one year of an October 14, 2008 rating decision which denied entitlement to an evaluation in excess of 30 percent for posttraumatic stress disorder.

While special wording is not required, a notice of disagreement must be in terms which can be reasonably construed as disagreement with that determination and a desire for appellate review. *See* 38 C.F.R. § 20.201 (2014). Although the October

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2009 correspondence clearly evidenced disagreement with the 30 percent rating, it was not clear whether the Veteran desired appellate review. Rather than request clarification, however, in a November 2009 notice letter, the RO stated only, “you may submit evidence showing that your service-connected [PTSD] has increased in severity.” *See* 38 C.F.R. § 19.26(b) (2015). Since the RO did not clarify this unclear communication, and the Veteran is presumed to be seeking the maximum available benefit, the Board will construe this as a timely notice of disagreement with the October 2008 rating decision. *See* 38 C.F.R. § 19.26(b); *AB v. Brown*, 6 Vet. App. 35, 38 (1993).

An August 2012 statement of the case and April 2014 supplemental statement of the case issued in connection with the present appeal only addressed the issue of entitlement to a rating in excess of 50 percent for posttraumatic stress disorder – a time period beginning October 5, 2009. A statement of the case addressing the period prior to that time therefore must be issued. *Manlincon v. West*, 12 Vet. App. 238, 240-41 (1999).

In addition, as there is evidence of unemployability due to service connected disability, the issue of entitlement to a total disability based on individual unemployability for the period prior to October 5, 2009, as part and parcel of the increased rating claim, has been raised by the evidence of record. *Rice v. Shinseki*, 22 Vet. App. 447, 453 (2009).

Accordingly, the case is REMANDED for the following action:

Issue the appellant a statement of the case for the issues of entitlement to a disability rating in excess of 30 percent for posttraumatic stress disorder prior to October 5, 2009 and entitlement to a total disability based on individual unemployability for the period prior to October 5, 2009. Then, if and ONLY IF the appellant files a timely substantive appeal, these issues should be returned to the Board for the purpose of appellate disposition.

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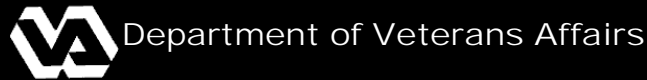
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The appellant has the right to submit additional evidence and argument on the matter or matters the Board has remanded. *Kutscherousky v. West*, 12 Vet. App. 369 (1999).

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).

DEREK R. BROWN

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).