BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

WASHINGTON, DC 20420

IN THE APPEAL OF C[redacted]
ROBERT M. SELLERS

DOCKET NO. 14-10 845A) DATE *April 29, 2016*
) *KEC*
)

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

THE ISSUES

1. Entitlement to an evaluation in excess of 40 percent for spondylolisthesis of the lumbosacral spine.

2. Entitlement to a compensable evaluation for laceration and tendon injury of the index and middle fingers, right (major) hand.

3. Entitlement to an evaluation in excess of 10 percent for left knee disability.

4. Entitlement to an initial evaluation in excess of 70 percent for major depressive disorder (MDD).

5. Entitlement to service connection for post traumatic stress disorder (PTSD).

6. Entitlement to service connection for bilateral ankle disability, to include vascular insufficiency of the lower extremities.

7. Entitlement to a total evaluation based on individual unemployability due to service connected disability (TDIU).

8. Entitlement to an effective date earlier than September 18 2009 for the award of a 40 percent evaluation for lumbosacral spine disability.

9. Entitlement to an effective date earlier than September 3, 2010 for the grant of service connection for major depressive disorder (MDD).

REPRESENTATION

Appellant represented by: John F. Cameron, Attorney

ATTORNEY FOR THE BOARD

C.A. Skow, Counsel

INTRODUCTION

The Veteran served on active duty from April 1964 to February 1968 in the US Navy, and from January 1981 to February 1996 in the US Army.

This case came before the Board of Veterans' Appeals (the Board) on appeal from February 2011, August 2011, and March 2014 rating decisions of the Department of Veterans Affairs (VA) Regional Offices (RO) in Montgomery, Alabama.

The Board notes that the Veteran's attorney submitted additional argument and evidence following the most recent Statements of the Case (SOC) in these matters without a waiver of consideration by the Agency of Original Jurisdiction (AOJ). These records are duplicative in substance or not relevant to the matters herein adjudicated by the Board, and therefore referral to the AOJ is not required. Additionally, to the extent that VA received additional evidence following the most recent SOC in regards to the earlier effective date claim for lumbosacral spine disability, the Board observes that the substantive appeal to the Board on that issue

from the Veteran's attorney was received after February 2, 2013 from the Veteran's attorney and, as such, a waiver of consideration by the originating agency in the first instance is presumed to be given. *See* Third Party Correspondence (April 25, 2014).

The Board further notes that the adjudication of the claims here has been delayed by request of the Veteran's attorney for the submission of additional evidence, to include a 3 month extension requested in December 2015. *See* Third Party Correspondence (February 3, 2016). VA received additional evidence in March 2016 to include web-based occupational information, a private vocational assessment, and Veteran's statement. *See* Third Party Correspondence (March 21, 2016).

The Veteran's claims have been reviewed using the Veterans Benefits Management System (VBMS), VA's electronic system for document record keeping, and relevant documents contained therein are part of the Veteran's electronic claims file.

The following issues are addressed in the REMAND portion of the decision below and are REMANDED to the AOJ: (1) Entitlement to an evaluation in excess of 40 percent for spondylolisthesis of the lumbosacral spine; (2) Entitlement to a compensable evaluation for laceration and tendon injury of the index and middle fingers, right (major) hand; (3) Entitlement to an evaluation in excess of 10 percent for left knee disability; and (4) Entitlement to service connection for bilateral ankle disability, to include vascular insufficiency of the lower extremities.

FINDINGS OF FACT

1. PTSD is attributable to service.

2. Total occupational and social impairment due to symptoms of major depressive disorder is not shown at any time during this appeal.

3. A formal claim for increase for low back disability was received by VA on September 18, 2009; the RO granted the claim for increase and assigned a 40 percent rating, effective September 18, 2009; VA received no claim (informal or otherwise) for increase in the year prior thereto, and it is not factually ascertainable in the year prior thereto that an increased evaluation was warranted.

4. VA received on September 18, 2009, an informal claim for service connection for psychiatric disability, claimed as PTSD; VA received no claim (informal or otherwise) for service connection for any psychiatric disability prior to this date.

5. The Veteran is unable to engage in substantially gainful employment due to the mental and physical limitations imposed by service-connected disability.

CONCLUSIONS OF LAW

1. The criteria for service connection for PTSD are met. 38 U.S.C.A. §§1110, 1131, 1154(a), 5107 (West 2014); 38 C.F.R. § 3.304(f) (2015).

2. The criteria for an initial evaluation in excess of 70 percent for major depressive disorder are not met. 38 U.S.C.A. §§ 5107, 1155 (West 2014); 38 C.F.R. §§ 4.7, 4.130, Diagnostic Code 9434 (2015).

3. The criteria for an effective date of earlier than September 18, 2009 for the assignment of a 40 percent disability evaluation for lumbosacral spine disability are not met. 38 U.S.C.A. §§ 5107, 5110 (West 2014); 38 C.F.R. § 3.400 (2015).

4. The criteria for an effective date of September 18, 2009, and no earlier, for the award of service connection for MDD are met. 38 U.S.C.A. §§ 5107, 5110 (West 2014); 38 C.F.R. § 3.400 (2015).

5. The criteria for schedular TDIU are met. 38 U.S.C.A. §§ 1155, 5107(b) (West 2014); 38 C.F.R. §§ 3.340, 3.341, 4.15, 4.16 (2015).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

I. PTSD

Entitlement to service connection for PTSD requires: (1) medical evidence diagnosing the condition in accordance with 38 C.F.R. § 4.125(a); (2) a link, established by medical evidence, between current symptoms and an in-service stressor; and (3) credible supporting evidence that the claimed in-service stressor occurred. 38 C.F.R. § 3.304(f) (2015).

Service connection for PTSD is granted. The Board finds that the record establishes a confirmed diagnosis of PTSD related to military experiences. Report of VA examination dated in July 2011 notes that the Veteran began to have depression following deaths of those he knew in service in the 1960s. The examiner found that the Veteran was traumatized by survivor's guilt. The Board finds that the Veteran's report of trauma from deaths while in service are consistent with the length of his service and circumstances of his service during a period of war. 38 U.S.C.A. § 1154(a) (2015).

II. Veterans Claims Assistance Act of 2000

The Veterans Claims Assistance Act (VCAA), codified in pertinent part at 38 U.S.C.A. §§ 5103, 5103A (West 2014), and the pertinent implementing regulation, codified at 38 C.F.R. § 3.159 (2015), provide that VA will assist a claimant in obtaining evidence necessary to substantiate a claim but is not required to provide assistance to a claimant if there is no reasonable possibility that such

assistance would aid in substantiating the claim. They also require VA to notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim.

As part of the notice, VA is to specifically inform the claimant and the claimant's representative, if any, of which portion, if any, of the evidence is to be provided by the claimant and which part, if any, VA will attempt to obtain on behalf of the claimant. Although the regulation previously required VA to request that the claimant provide any evidence in the claimant's possession that pertains to the claim, the regulation has been amended to eliminate that requirement for claims pending before VA on or after May 30, 2008.

The Board also notes the United States Court of Appeals for Veterans Claims (Court) has held the plain language of 38 U.S.C.A. § 5103(a) requires notice to a claimant pursuant to the VCAA be provided "at the time" or "immediately after" VA receives a complete or substantially complete application for VA-administered benefits. *Pelegrini v. Principi,* 18 Vet. App. 112, 119 (2004).

The timing requirement articulated in *Pelegrini* applies equally to the initial-disability-rating and effective-date elements of a service-connection claim. *Dingess/Hartman v. Nicholson,* 19 Vet. App. 473 (2006).

VA met its duty to notify. VA sent to the Veteran all required notice in October 2009, April 2010, and October 2010 letters, prior to the ratings decision on appeal. Notably, the claim for increase for MDD arises from the Veteran's disagreement with the initial rating assigned following the grant of service connection. *See* Rating Decision (August 2011); Notice of Disagreement (October 2011). In cases where service connection has been granted and an initial rating and effective date have been assigned, the typical service connection claim has been more than substantiated, it has been proven. As a result, no additional 38 U.S.C.A. § 5103(a) notice is required because the purpose that the notice is intended to serve has been fulfilled. *Hartman v. Nicholson,* 483 F.3d 1311 (Fed. Cir. 2007); *Dunlap v. Nicholson,* 21 Vet. App. 112 (2007).

VA also met its duty to assist. VA obtained all relevant medical treatment records identified by the Veteran. These records have been associated with the claims file. VA further afforded the Veteran appropriate VA medical examinations. Neither the Veteran nor his attorney has identified any outstanding evidence that could be obtained to substantiate the Veteran's claim for increase herein addressed; the Board is also unaware of any such evidence.

The evidence currently of record is sufficient to substantiate entitlement to the benefits sought in regards to the claims for service connection for PTSD, an earlier effective date for the grant of service connection for MDD, and TDIU. As such, no further development is required under 38 U.S.C.A. §§ 5103, 5103A (West 2014) or 38 C.F.R. § 3.159 (2015).

III. Initial Evaluation of MDD

The Veteran seeks an initial evaluation in excess of 70 percent for MDD. It is noted that, in an August 2011 rating decision, the RO granted service connection for MDD at the 70 percent disability level under Diagnostic Code 9434, effective from May 13, 2011. *See* Rating Decision (August 2011). In a March 2014 rating decision, the RO granted an earlier effective for the grant of service connection from September 3, 2010. *See* Rating Decision (March 2014). The Veteran through his attorney appeals the both the disability rating and effective date assigned for MDD. *See* VA Form 9 (April 2014) and VA Form 9 (October 2015).

Except as otherwise provided by law, a claimant has the responsibility to present and support a claim for benefits under laws administered by the Secretary. The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant. 38 U.S.C.A. § 5107 (West 2014); 38 C.F.R. § 3.102 (2015); *see also Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990). To deny a claim on its merits, the evidence must preponderate against the claim. *Alemany v. Brown*, 9 Vet. App. 518, 519 (1996), *citing Gilbert*, 1 Vet. App. at 54.

Although the Board has granted the claim for PTSD, it is noted that there is no prejudice to the Veteran from the Board's consideration of the MDD claim for the following reasons: (1) the general rating formula for mental disorders governs the rating of both PTSD under Diagnostic Code9411 and MDD under Diagnostic Code 9434; (2) the July 2011 VA examination report shows that the Veterans MDD and PTSD symptoms significantly overlap and may not be parsed from each other; (3) the Board has considered all the Veteran's psychiatric symptoms regardless of the diagnosis attached in evaluating his entitlement to an initial evaluation in excess of 70 percent for MDD—there are no manifestations of psychiatric disability left uncompensated; and (4) a veteran may not be compensated twice for the same symptomatology as this would result in pyramiding, contrary to the provisions of 38 C.F.R. § 4.14.

Legal Criteria

Disability evaluations are determined by the application of the VA Schedule for Rating Disabilities (Rating Schedule). 38 C.F.R. Part 4. The percentage ratings contained in the Rating Schedule represent, as far as can be practicably determined, the average impairment in earning capacity resulting from diseases and injuries incurred or aggravated during military service and their residual conditions in civil occupations. 38 U.S.C.A. § 1155; 38 C.F.R. § 4.1. If two evaluations are potentially applicable, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that evaluation; otherwise, the lower rating will be assigned. 38 C.F.R. § 4.7.

In general, all disabilities, including those arising from a single disease entity, are rated separately, and all disability ratings are then combined in accordance with 38 C.F.R. § 4.25. However, the evaluation of the same "disability" or the same "manifestations" under various diagnoses is prohibited. 38 C.F.R. § 4.14.

A disability may require re-evaluation in accordance with changes in a veteran's condition. It is thus essential, in determining the level of current impairment, that the disability be considered in the context of the entire recorded history. 38 C.F.R. § 4.1.

MDD is evaluated pursuant to 38 C.F.R. § 4.130, Diagnostic Code 9434, which provides for a 70 percent rating is warranted for occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, 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 as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a worklike setting); inability to establish and maintain effective relationships. 38 C.F.R. § 4.130, Diagnostic Code 9434.

A 100 percent evaluation is indicated where there is total occupational and social impairment, due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self of others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; memory loss for names of close relatives, own occupation, or own name. 38 C.F.R. § 4.130, Diagnostic Code 9434.

When evaluating a mental disorder, the rating agency shall consider the frequency, severity, and duration of psychiatric symptoms, the length of remissions, and the veteran's capacity for adjustment during periods of remission. An evaluation is based on all the evidence of record that bears on occupational and social impairment, rather than solely on the examiner's assessment of the level of disability at the moment of the examination. When evaluating the level of disability from a mental disorder, the rating agency will consider the extent of social impairment, but shall not assign an evaluation solely on the basis of social impairment. 38 C.F.R. § 4.126. The rating formula is not intended to constitute an exhaustive list, but rather is intended to provide examples of the type and degree of the symptoms, or their effects, that would justify a particular rating. *Mauerhan v. Principi*, 16 Vet. App. 436 (2002). Accordingly, the evidence considered in determining the level of impairment under § 4.130 is not restricted to the symptoms provided in the Diagnostic Code. Instead, VA must consider all symptoms of a

Veteran's condition that affect the level of occupational and social impairment, and assign an evaluation based on the overall disability picture presented. However, the impairment does need to cause such impairment in most of the areas referenced at any given disability level. *Vazquez-Claudio v. Shinseki,* 713 F. 3d. 112 (Fed. Cir. 2013).

The Board is required to analyze the credibility and probative value of the evidence, account for any evidence that it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *See Daye v. Nicholson,* 20 Vet. App. 512, 516 (2006). It is noted that competency of evidence differs from weight and credibility. The former is a legal concept determining whether testimony may be heard and considered by the trier of fact, while the latter is a factual determination going to the probative value of the evidence to be made after the evidence has been admitted. *Rucker v. Brown,* 10 Vet. App. 67, 74 (1997); *Layno v. Brown,* 6 Vet. App. 465, 469 (1994); *see also Cartright v. Derwinski,* 2 Vet. App. 24, 25 (1991) ("although interest may affect the credibility of testimony, it does not affect competency to testify"). In determining whether statements are credible, the Board may consider internal consistency, facial plausibility, and consistency with other evidence submitted on behalf of the claimant. *Caluza v. Brown,* 7 Vet. App. 498 (1995).

Facts and Analysis

Having carefully reviewed the evidence of record, the Board finds that the preponderance of the evidence is against an initial evaluation in excess of 70 percent for MDD. Neither the lay nor the medical evidence more nearly reflect the frequency, severity or duration of symptoms contemplated by the next higher evaluation—that is, total occupational and social impairment due to MDD symptoms. 38 C.F.R. §§ 4.7, 4.130, Diagnostic Code 9434 (2015).

VA treatment records reflect that symptoms of depression were noted in 2008. Treatment noted dated in 2009 and 2010 reflect GAF scores from 55 to 65. A January 2009 note reflects that the Veteran enjoys and spends time fishing and hunting, and he reported a good relationship with his son. In October 2009, the

Veteran reported marital conflict and self-employment; mildly anxious mood was noted. A depression screen disclosed anhedonia, depression, sleep impairment, poor energy/fatigue, poor appetite or overeating, and concentration trouble. In December 2009, the Veteran denied suicidal/homicidal ideation. His spouse reported that the Veteran's outbursts "are a little better," only 2 since his last visit. The Veteran reported daytime fatigue, snoring. Objectively, mood was mildly anxious and fatigued. Affect was congruent. He was fully oriented with no impairment of attention, concentration, memory, insight, or judgment. The Veteran denied suicidal/homicidal thoughts. Depression screening showed little interest or pleasure in doing things, nearly every day, and feeling down, depressed or hopeless nearly every day.

A 2010 VA treatment note reflects that the Veteran reported "feeling very depressed" and suicidal thoughts due to severe musculoskeletal pain. He stated "I have a plan" described as "getting in my canoe going down the river [and] putting the gun in my mouth and pulling the trigger." He further reported poor sleep, stating "I can't sleep at night but 2 hours a night" because has nightmares related to his military experiences in Special Forces. VA treatment records dated in 2011 note that the Veteran participated in anger management therapy and PTSD group therapy.

Report of VA examination dated in May 2011 reflects, by history, long standing depressive disorder. The Veteran reported using anti-depressant medication (Paroxetine, Mirtazapine, and Prazosin) since May 2011 that causes him drowsiness and dizziness. He denied group therapy. Objectively, the Veteran was clean, neatly groomed, and with unremarkable psychomotor activity. Speech was moderately forceful. Attitude was cooperative and friendly. Affect was constricted. Mood was dysphoric (mildly angry). Attention and orientation were intact. There was no impairment of thought process or thought content. There were no delusions/hallucinations. The Veteran reported an average of 2 hours sleep a night, disrupted by nightmares related to his going days without sleep during Special Forces training and operations. The Veteran had no panic attacks. He had homicidal thoughts, but indicated he would not act unless he was terminally ill. He denied suicidal thoughts. Impulse control was fair without episodes of violence.

Memory was normal. The Veteran reported that he was retired as a laborer, grass cutter. The diagnoses were MDD, recurrent, moderate, and PTSD. A GAF score of 49 (over past 2 years) was assigned. The examiner stated that the Veteran does not have total social and occupational impairment due to mental disorder signs and symptoms. The examiner noted that the Veteran had strong opinions about right and wrong, and these opinions "seem to result in Vet having some social difficulty" and difficulty getting along with others in the work place. The examiner found "reduced reliability and productivity due to mental disorder symptoms" and elaborated as follows:

> [The Veteran] may have difficulty in getting along with a boss who is other than supportive and kind. Vet describes himself as getting very little sleep and this seems to result in considerable irritability. Finally the cognitive effects of the significant physical pain he seems to be in right now would significantly reduce his concentration.

Report of VA examination dated in July 2011 reflects a comprehensive review of the Veteran's background and pertinent medical records. The examiner found that the Veteran did not have total occupational and social impairment due to mental disorder signs and symptoms. The examiner found that that the Veteran had occupational and social impairment with deficiencies in most areas, such as work, judgement, thinking, family relations and mood. The Beck Depression Inventory II was administered, which showed symptoms of severe depression with symptoms of moderate agitation, marked irritability, marked anhedonia, moderate indecisiveness, moderately reduced energy level, and moderately reduced libido. The examiner further noted that there were symptoms of difficulties concentrating, impaired sleep (only sleeping 1-2 hours of sleep a day and "visions" of guys that died if goes into a deep sleep), and difficulties coping with others. The Veteran reported suicidal thoughts without intent ("I have thoughts of killing myself, but I would not carry them out."). The Veteran denied any plan to harm himself. He had no homicidal thoughts. The Veteran reported that he drives with difficulty due to physical medical problems, and that his wife usually makes his medical appointments. Speech and mood were described as "within normal limits." Affect and memory

(remote, recent and immediate) were described as normal. Attention was intact. Attitude was cooperative. The Veteran reported that he had poor impulse control but denied episodes of violence, stating that "I just curse and fly off the handle." There was no impairment of orientation to person, place or time. Also, there was no impairment of thought content or process, insight, or judgement. The Veteran denied panic attacks or obsessive/compulsive behavior. There was no impairment in the Veteran's ability to perform the activities of daily living. By history, the Veteran had quit his lawn business in 2009.

Subsequently dated VA treatment records show ongoing group therapy for the Veteran's psychiatric problems. A September 2011 note reflects that the Veteran was tired, irritable, and had homicidal thoughts to be executed only if he had terminal illness. The examiner sought to have the Veteran seen by a psychiatrist or hospitalized, but the Veteran declined both meeting with a psychiatrist and hospitalization, and he further questioned the use of therapy. The examiner commented that the Veteran demonstrated a "willingness to nurture his anger and attitude which makes change difficulty." VA treatment records also show a diagnosis for obstructive sleep apnea interfering with sleep.

The Board finds that "total occupational and social impairment" due to MDD symptoms is not more nearly approximated by the evidence of record. Although the record shows that the Veteran's symptoms would make it difficult to adapt to a work-like setting due to disturbances of mood and motivation, anger issues, as well as fatigue and decreased concentration related to poor sleep and nightmares, total occupational impairment is not shown. Although the Veteran has expressed suicidal and homicidal thoughts, the record does not establish that he is a persistent danger to himself or others, particularly since the Veteran consistently has made such execution of plans contingent on other events or factors. Additionally, neither the lay nor the medical evidence shows total social impairment. The Veteran has been married throughout this appeal. Although marital conflict was noted, the record shows that the Veteran and his spouse have a supportive relationship as demonstrated by his report that his spouse schedules his medical appointments and records showing that she accompanied him on medical visits. The record shows that the Veteran and his spouse live together along with their son, and that the

Veteran reported a good relationship with his son. There is no indication that the Veteran's relationship with his son has changed. The record shows that the Veteran attends his doctor visits, and has participated in group therapy sessions for his psychiatric symptom during this appeal. To the extent that the Veteran experiences near-continuous depression, this has not resulted in any inability to functioning independently, appropriately, and effectively. Although the record shows some impaired impulse control and anger issues, the Veteran has consistently denied episodes of violence.

The Board has considered the Veteran's GAF score, which is indicative of 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). *See Richard v. Brown*, 9 Vet. App. 266, 267 (1996), *citing* the Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) (DSM-IV). However, the medical professionals examining the Veteran clearly indicated that the Veteran did not have total occupational and social impairment due to his symptoms.

The Board believes that the Veteran's symptomatology more nearly reflects the criteria for a 70 percent disability evaluation. For example, he has disturbances of mood and motivation to include feelings of depression, anxiety, and suicidal thoughts, but these symptoms have not been so frequent or severe to keep him from attending medical appointments, group therapy, and maintaining his marriage albeit with difficulty. He had no panic attacks. He had suicidal and homicidal thoughts but neither his statements nor the medical findings reflect that he is a persistent danger to himself or others. He has not tried to kill himself since 1994 during service, and he declined psychiatric help for his suicidal and homicidal thoughts. The record shows that the Veteran is able to attend to the activities of daily living to include the maintenance of minimal personal hygiene. Additionally, although he experiences chronic sleep impairment, there is no memory loss, difficulty in understanding complex commands, or impaired judgment or insight shown. The Veteran is not without friends. He reported on VA examination in 2011 that his friends were limited to his brothers, his son, and "guess my grandkids." The Veteran's constellation of symptoms is more consistent with the criteria for a 70

percent rating based on deficiencies in most areas, and does not more nearly reflect total occupational and social impairment.

The Board has considered the vocational assessment dated in March 2016, which reflects that the Veteran is precluded from work by his service-connected major depression alone. However, the vocational expert does not acknowledge any level of social impairment, much less total social impairment, that would support a higher schedular disability rating for MDD. Also, his statement of total disability is incongruous with his acknowledgement that the symptoms cause diminished ability to function independently without any discussion thereof. The Board finds that his medical conclusions are of diminished probative value as he not a medical professional and his findings are incongruous with his discussion of the Veteran's symptoms.

As finder of fact, it is within the Board's province to determine the probative weight of evidence. *Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed.Cir.2006). The Veteran's statements along with the VA examination findings in 2011 are highly probative in this matter. Here, the evidence more nearly reflect the criteria for the currently assigned 70 percent evaluation, and do not more nearly reflect the criteria for the next higher rating, 100 percent, based on total occupational and social impairment. Notably, the Veteran's private attorney has not made any specific argument as to how the Veteran meets the criteria for increase or presented a favorable medical opinion in this matter.

Weighing the evidence of record, the Board finds that the Veteran's MDD symptomatology more closely approximates the schedular criteria for a 70 percent rating. Furthermore, the Board finds that a uniform 70 percent evaluation is warranted; the criteria for a higher evaluation are not met at any time during this appeal. *Fenderson v. West*, 12 Vet. App. 119, 126 (2001). *See also Hart v. Mansfield*, 21 Vet. App. 505 (2007) (staged ratings are appropriate when the factual findings show distinct period where the service- connected disability exhibits symptoms that would warrant different ratings).

Accordingly, the claim for a higher initial evaluation is denied. As the evidence is not in equipoise, there is no doubt to resolve. 38 U.S.C.A. § 5107(b); *Gilbert, supra.*

IV. Effective Dates of Claims

The law specifies that, unless otherwise provided, the effective date of an award of compensation based on an original application shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of the application therefor. 38 U.S.C.A. § 5110(a) (West 2014); 38 C.F.R. § 3.400 (2015). The Board notes that the effective date of an award of increased compensation may, however, be established at the earliest date as of which it is factually ascertainable that an increase in disability had occurred, if the application for an increased evaluation is received within one year after that date. 38 U.S.C.A. § 5110(b) (2); 38 C.F.R. § 3.400(o)(2).

In addition, the Court has held it is axiomatic that, in the latter circumstance above, the service- connected disability must have increased in severity to a degree warranting an increase in compensation. *See Hazan v. Gober,* 10 Vet. App. 511, 519 (1992) (noting that, under section 5110(b) (2) which provides that the effective date of an award of increased compensation shall be the earliest date of which it is ascertainable that an increase in disability had occurred, "the only cognizable 'increase' for this purpose is one to the next disability level" provided by law for the particular disability). Thus, determining whether an effective date assigned for an increased rating is correct or proper under the law requires (1) a determination of the date of the receipt of the claim for the increased rating as well as (2) a review of all the evidence of record to determine when an increase in disability was "ascertainable." *Id.* at 521.

A claim is a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement to a benefit. 38 U.S.C.A. § 101(30); 38 C.F.R. § 3.1(p).

The date of receipt shall be the date on which a claim, information or evidence was received by VA. 38 U.S.C.A. § 101(30); 38 C.F.R. § 3.1(r). Any communication or action, indicating intent to apply for one or more benefits under the laws administered by VA, from a claimant, his or her duly authorized representative, a Member of Congress, or some person acting as next friend of a claimant who is not *sui juris* may be considered an informal claim. Such informal claims must identify the benefit sought. 38 C.F.R. § 3.155.

Under 38 C.F.R. § 3.157, a report of examination or hospitalization will be accepted as an informal claim for benefits. However the provisions of 38 C.F.R. § 3.157(b)(1) state that such reports must relate to examination or treatment of a disability for which service-connection has previously been established or that the claim specifying the benefit sought is received within one year from the date of such examination, treatment, or hospital admission. 38 C.F.R. § 3.157(b)(1).

A. Lumbosacral Spine Disability

Having carefully reviewed the record, the Board finds that an effective date earlier than September 18 2009 for the award of a 40 percent evaluation for lumbosacral spine disability is not warranted.

On September 18, 2009, the Veteran called the RO and requested to file a claim for increase for his low back. *See* VA Form 119 (October 5, 2009). This phone call was documented on VA Form 119 and accepted as an informal claim for increase. Prior to September 18, 2009, VA had received no claim (informal or otherwise) for increase, and it is not factually ascertainable in the year period prior to September 18, 2009 that an increased evaluation was warranted. All the evidence of record has been reviewed to determine whether an increase in disability was "ascertainable." However, although the record shows complaints of severe low back pain and findings for multi-level degenerative disk disease during the year preceding the date of the formal claim, the record does not include either complaints or medical findings that make it "factually ascertainable" that the Veteran met the scheduler criteria for an increased rating at any time during the one-year period prior to September 18, 2009. To the extent that the Veteran reports or suggests that he did

in fact meet the criteria for increase during the year preceding his formal claim in September 2009, the Board finds that his generic report has diminished probative value as he had not reported nor did the medical evidence show that forward flexion limited to 30 degrees or less, or favorable ankylosis of the thoracolumbar spine. Thus, while the Veteran is competent to report his symptoms, *Layno, supra*, the Board finds that his statements have diminished probative value as they are vague and non-specific, and not bolstered by the medical evidence during the year prior to his September 2009 claim for increase.

The Board observes that neither the Veteran nor his attorney has pointed to any particular VA treatment record or other document as evidence showing that entitlement to an increase was factually ascertainable at an earlier date. The Board further observes that, following VA's notification of the grant of service connection for the low back in July 1996, the RO had not received any correspondence or other contact from the Veteran prior to September 18, 2009. The Board accepts that the Veteran had worsened symptoms prior to his phone call to the RO in September 2009 requesting an increase. However, it is not factually ascertainable that he met the criteria for a higher evaluation at the time of the phone call in September 2009 or the year prior thereto.

Accordingly, the claim is denied. Because the evidence is not roughly in equipoise, the benefit-of-the-doubt does not apply. 38 U.S.C.A. § 5107; 38 C.F.R. § 3.102; and *Gilbert supra.*

B. MDD

Having carefully reviewed the record, the Board finds that an effective date of September 18, 2009, and no earlier, is warranted for the grant of service connection for the Veteran's psychiatric disability (major depressive disorder or MDD). The record shows that VA received on September 18, 2009, an informal claim for service connection for psychiatric disability, claimed as PTSD. *See* VA Form 119 (September 18, 2009). It is noted that, when a claimant makes a claim, he is seeking service connection for symptoms regardless of how those symptoms are diagnosed or labeled. *Clemons v. Shinseki*, 23 Vet. App. 1 (2009).

However, there is no legal basis for the assignment of an effective date earlier than September 18, 2009 for the award for service connection for MDD because the effective of the award is the date of receipt of the claim or the date entitlement arose, whichever is later. 38 C.F.R. § 3.400. In this case, the later date is September 18, 2009.

The Board observes that VA received no claim (informal or otherwise) for service connection for any psychiatric disability prior to September 19, 2009. Notably, prior to this date, VA had not received any correspondence from the Veteran or a representative since 1996. Also, although the Veteran had filed an original VA compensation claim in April 1971 and a claim for benefits in March 1996, these did not include any claim for psychiatric disorder or problems that could be reasonably construed as a claim for service connection for psychiatric disability.

Accordingly, the claim for an effective date of September 18, 2009, and no earlier, for the award for service connection for MDD is granted.

V. TDIU

The Board has considered all the evidence of record, to include the March 2015 private vocational assessment.

TDIU is granted. Where the schedular rating is less than total, a total disability rating for compensation purposes may be assigned when the disabled person is unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities, provided that, if there is only one such disability, this disability shall be ratable at 60 percent or more, or if there are two or more disabilities, there shall be at least one ratable at 40 percent or more, and sufficient additional disability to bring the combined rating to 70 percent or more. 38 C.F.R. §§ 3.340, 3.341, 4.16(a) (2015).

Here, the Veteran meets the numeric evaluation for TDIU and the record shows that he has mental and physical impairment due to service-connected disability that precludes gainful employment, resolving all doubt in favor of the Veteran. Notably,

the Veteran has a 70 percent evaluation for MDD and a 40 percent evaluation for lumbosacral spine disability along with other disabilities rated at 10 percent or less; his combined disability evaluation is 80 percent.

The evidence establishes that the Veteran is unable to engage in substantially gainful employment due to the mental and physical limitations imposed by service-connected disability.

ORDER

Service connection for PTSD is granted.

An initial evaluation in excess of 70 percent for MDD is denied.

An effective date earlier than September 18, 2009 for the award of a 40 percent evaluation for lumbosacral spine disability is denied.

An effective date of September 18, 2009, and no earlier, for the award of service connection for MDD is granted.

TDIU is granted.

REMAND

After careful review of the record, the Board finds that further development is required. VA's duty to assist requires that VA obtain a medical examination when necessary to decide the claim. 38 C.F.R. § 3.159(c)(4).

A. Claims for Increase: Low Back, Fingers of Right Hand, and Left Knee

Where the evidence of record does not reflect the current state of the disability, a VA examination must be conducted. *Schafrath v. Derwinski*, 1 Vet. App. 589, 592

(1991). Also, reexamination will be requested whenever there is a need to verify either the continued existence or the current severity of a disability. 38 C.F.R. § 3.327(a).

In this case, the Board finds that reports of VA examination dated in June 2010 of the right hand's fingers, left knee, and spine are inadequate for rating purposes.

Report of VA examination of the "Hand, Fingers, and Thumb" does not fully address the Veteran's functional impairment, if any, due to pain, incoordination, weakness, fatigue, or lack of endurance with repetitive motion. It is noted that the Veteran reported symptoms of weakness and "stinging of the fingers," but the examiner did not address whether there was any residual muscle injury or neurological impairment related to his disability or the underlying injury.

Report of VA examination of the knee dated in June 2010 reflects that the Veteran had arthroscopic surgery on the left knee in the early 1990's. The Veteran complained of left knee giving way, instability, pain, stiffness, decreased speed of joint motion, locking episodes (1-3 times a month), and impaired range of motion. The Veteran reported that he was unable to walk more than a few yards, and he intermittent but frequently used a walker. Objective examination of the Veteran failed to address whether there was joint laxity with recurrent subluxation or lateral instability of the left knee joint; and whether the Veteran had "frequent episodes of 'locking,' pain and effusion into the joint." Also, the examiner failed to address whether there was functional impairment due to pain, incoordination, weakness, fatigue, or lack of endurance with repetitive motion.

Report of VA examination of the spine dated in June 2010 reflects that the Veteran complained of numbness and paresthesias, and symptoms of pain radiating down both legs—described as stinging and burning. It was noted that an April 2009 MRI showed severe back pain with radiculopathy due to degenerative disk disease with virtually every lumbar segment affected to some degree. It was further noted that an EMG/NCS, no date given, was negative for radiculopathy and peripheral neuropathy of the left or right lower extremities. The examiner did not address the Veteran's functional impairment, if any, due to pain, incoordination, weakness,

fatigue, or lack of endurance with repetitive motion. Also, the examiner did not address the etiology of the Veteran's lower extremity complaints. Notably, a private neurology treatment record dated in February 2010 shows an assessment for lumbar radiculopathy—noting diffuse weakness of lower extremities, hypoesthesia to pinprick, and absent knee/ankle jerks bilaterally.

Additionally, in April 2015, the Veteran's attorney submitted additional pertinent private medical records concerning the spine and left knee without waiving consideration by the AOJ.

Therefore, in regard to the low back, right hand fingers, and left knee, remand for new VA examinations is necessary to fully address all symptoms and provide detailed clinical findings for consideration in the context of the schedular criteria.

B. Service Connection for Bilateral Ankle Disability

The Veteran seeks service-connected for right and left ankle disabilities. He reported symptoms of swelling. He suggested that this is attributable to service, specifically his parachuting activities. Also, in April 2015, the Veteran's attorney submitted a November 2011 letter indicating that the Veteran had moderate venous insufficiency of the lower extremities. Therefore, because the VA examination dated in June 2011 did not take into account the Veteran's venous insufficiency and recognizing that claimants are actually seeking consideration of all symptoms reasonably encompassed by the claim, remand is necessary for a new VA examination addressing the etiology of the Veteran's ankle swelling and lower extremity vascular insufficiency, to include an opinion on whether it is etiology related to service or secondary to service-connected disability.

Accordingly, the case is REMANDED for the following action:

1. All updated pertinent treatment records should be requested and associated with the claims file.

2. The Veteran should be scheduled for a VA examination of the "Hand, Fingers, and Thumb" to ascertain the severity of service-connected residuals of laceration and tendon injury to the index and middle fingers of the right (major) hand. All symptoms and clinical findings should be reported in detail, to include complaints or findings pertaining to muscle and neurological involvement, if any. The examiner should address whether the Veteran has functional impairment due to pain, incoordination, weakness, fatigue, or lack of endurance with repetitive motion. It is noted that the Veteran reported symptoms of weakness and "stinging of the fingers" on VA examination in June 2010. The examiner should address whether there is muscle impairment or neurological abnormality that is as likely as not (50 percent or greater probability) related to the Veteran's service-connected right index and middle fingers disability or the underlying injury. It is noted that "cardinal signs and symptoms" of muscle disability are loss of power, weakness, lowered threshold of fatigue, fatigue-pain, impairment of coordination and uncertainty of movement. All pertinent evidence in the Veteran's claims file should be reviewed. A complete rational for all opinions is required.

3. The Veteran should be scheduled for a VA examination to ascertain the severity of service-connected left knee disability. All appropriate tests deemed necessary should be conducted and all clinical findings should be reported in detail. Range of motion testing should be recorded to include the point at which pain begins and ends. Three repetitions of use should be conducted, if possible, to determine whether there is additional loss of motion, or increased pain, fatigue,

weakness, lack of endurance, or incoordination. The examiner should indicate the severity of any subluxation or lateral instability found to include whether the Veteran uses any appliances or devices. The examiner should further indicate whether the Veteran has "frequent episodes of 'locking,' pain and effusion into the joint." All pertinent evidence in the Veteran's claims file should be reviewed. A complete rationale for all opinions is required.

4. The Veteran should be scheduled for a VA examination to ascertain the severity of service-connected lumbosacral spine disability to include whether there is any associated neurological abnormality of the lower extremities. All appropriate tests deemed necessary should be conducted and all clinical findings should be reported in detail. Range of motion testing should be recorded to include the point at which pain begins and ends. Three repetitions of use should be conducted, if possible, to determine whether there is additional loss of motion, or increased pain, fatigue, weakness, lack of endurance, or incoordination. The examiner should indicate whether the Veteran has "unfavorable ankylosis of the entire thoracolumbar spine" and, if so, the date of this is objectively shown. The examiner should indicate whether the Veteran has any neurological abnormality of the lower extremities associated with his service-connected spondylolisthesis of the lumbosacral spine—and if so, the nerve group(s) involved and severity. All pertinent evidence in the Veteran's claims file should be reviewed. A complete rationale for all opinions is required.

5. The Veteran should be scheduled for a VA examination of the ankles by an appropriately skilled physician to address the etiology of his complaints of swelling and the documented findings for vascular insufficiency. Also, for each ankle/lower extremity, the physician should indicate:

(a) Whether it is as likely as not (50 percent probability or more) that any currently shown disorder is etiologically related to service, to include the Veteran's history of parachute jumps; and

(b) Whether it is as likely as not (50 percent probability or more) that any currently shown disorder is proximately due to or aggravated by service-connected disability.

Aggravation is defined as a permanent worsening of the nonservice-connected disability beyond that due to the natural disease process as contrasted to temporary or intermittent flare-ups of symptomatology which resolve with return to the baseline level of disability.

All pertinent evidence in the claims file must be reviewed by the physician. A complete rationale for all opinions is required. The physician should identify and explain the relevance or significance, as appropriate, of any history, clinical findings, medical knowledge or literature, etc., relied upon in reaching the conclusions. If an opinion cannot be expressed without resort to speculation, the examiner should so indicate and discuss why an opinion is not possible, to include whether there is additional evidence that could enable an opinion to be provided, or whether the inability to provide the opinion is based on the limits of medical knowledge.

> 6. Then, the AOJ should ensure that the requested examinations contained all information sought and that all opinions include complete rationales. The AOJ should undertake any other development it determines to be warranted.
>
> 7. After the development requested above has been completed to the extent possible, the AOJ should readjudicate the issues on appeal. If the benefits sought on appeal are not granted to the Veteran's satisfaction, he and his attorney should be furnished a Supplemental Statement of the Case and given the requisite opportunity to respond before the claims files are returned to the Board for further appellate action.

The Veteran 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).

_____

MICHAEL LANE
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).