BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF XC [redacted]
KATHY ROBERTS

IN THE CASE OF
HUBERT D. ROBERTS

DOCKET NO. 08-23 958) DATE *June 10, 2016*
) *KHW*
)

On appeal from the
Department of Veterans Affairs Regional Office in Detroit, Michigan

THE ISSUE

Entitlement to service connection for a lower back disorder.

REPRESENTATION

Appellant represented by: Veterans of Foreign Wars of the United States

ATTORNEY FOR THE BOARD

Christopher M. Collins, Associate Counsel

IN THE APPEAL OF XC [redacted]
KATHY ROBERTS

IN THE CASE OF
HUBERT D. ROBERTS

INTRODUCTION

The Veteran served on active duty from April 1962 to February 1966. The Veteran died in February 2013. The appellant is the Veteran's surviving spouse.

This matter is before the Board of Veterans' Appeals (Board) on appeal from an October 2007 rating decision by the Department of Veterans Affairs (VA) Regional Office (RO) in Detroit, Michigan.

In October 2010, the Veteran testified at a Travel Board hearing before the undersigned Acting Veterans Law Judge (VLJ) at the Detroit RO. A transcript of the hearing is of record.

In February 2011, the Board remanded the matter to the RO for further development of the evidence.

Subsequent to the Board's remand, the Veteran died in February 2013. In May 2016, the RO granted the appellant's March 2013 request to substitute for the Veteran in his claim of service connection for a low back disorder. Thus, this claim is being continued with the appellant as the substitute claimant. 38 U.S.C.A. § 5121A (West 2014); 38 C.F.R. § 3.1010(e) (2015).

FINDING OF FACT

The Veteran's lower back disorder, diagnosed as degenerative arthritis and degenerative disc disease of the lumbar spine, was not shown to have been related to his active service or to any incident therein.

CONCLUSION OF LAW

The criteria for service connection for a lower back disorder, for purposes of accrued benefits, have not been met. 38 U.S.C.A. §§ 1110, 1112, 1113, 1131, 5107 (West 2014); 38 C.F.R. §§ 3.102, 3.303, 3.307, 3.309 (2015).

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veterans Claims Assistance Act of 2000 (VCAA)

The VCAA, codified in part at 38 U.S.C.A. §§ 5103, 5103A, and implemented in part at 38 C.F.R. § 3.159, enlarged VA's duties to notify and to assist a claimant in developing information and evidence necessary to substantiate the claim. Under 38 U.S.C.A. § 5103(a), VA must notify the claimant of any information, and any medical or lay evidence, not previously provided to VA that is necessary to substantiate the claim. Furthermore, as part of the notice, VA must indicate which portion of that information and evidence is to be provided by the claimant and which portion VA will obtain. VCAA notice requirements apply to all five elements of a service connection claim: 1) veteran status; 2) existence of a disability; 3) a connection between the veteran's service and the disability; 4) degree of disability; and 5) effective date of the disability. *Dingess v. Nicholson*, 19 Vet. App. 473, 484 (2006). Pursuant to its obligations under the VCAA, VA is required to provide notice to a claimant before the initial unfavorable adjudication by the RO. *Pelegrini v. Principi*, 18 Vet. App. 112, 120 (2004).

The Veteran filed an informal claim for compensation benefits in March 2006. In response to that informal claim, and prior to the October 2007 adjudication, the RO provided him with VCAA notice via letter dated in May 2006. He was notified of the evidence needed to substantiate his claim for service connection and that VA was responsible for obtaining military service records, records from VA medical

centers, or records in the custody of other agencies, so long as he adequately identified those records and authorized VA to obtain those records. In addition, he was informed that he could submit records not in the custody of a federal agency on his own behalf or authorize VA to obtain such records, and that he was ultimately responsible for obtaining any requested records not in the custody of a Federal department or agency. Finally, the letter notified him of the criteria that VA utilizes when determining the disability rating and the effective date of awards. Thus, VA satisfied its duty to notify as to both the Veteran and the appellant. 38 U.S.C.A. § 5103; 38 C.F.R. §§ 3.159, 3.1010(f)(1).

Under 38 U.S.C.A. § 5103A, VA must also make reasonable efforts to assist the claimant in obtaining that evidence which is necessary to substantiate his claim. The RO has obtained the Veteran's service personnel and treatment records, as well as private treatment records and Social Security Administration (SSA) records documenting the Veteran's history of disability claims and the associated medical records. Neither the Veteran during his lifetime, nor the appellant since she has substituted into the Veteran's claim, identified any additional available evidence for consideration.

Pursuant to the Board's February 2011 remand, the RO was directed to contact the National Personnel Records Center (NPRC) or appropriate authorities to attempt to obtain outstanding records at the Bolling Air Force Base hospital, and notify the Veteran if no such records were available. In addition, the RO was directed to obtain the Veteran's SSA records, and again notify the Veteran if no such records were available. Finally, the RO was directed to schedule the Veteran for a VA examination with a qualified examiner to determine the nature and etiology of his currently diagnosed lower back disorder and provide an opinion as to the likelihood that the lower back disorder was related to the Veteran's military service.
The RO attempted to obtain outstanding records from the Bolling Air Force Base hospital but was unable to secure any additional records from the applicable period. At this point the appellant had been substituted as the appropriate claimant in the

matter, so the RO notified her in a November 2014 letter of the fact that the outstanding records were unavailable. As mentioned previously, the RO obtained the Veteran's SSA records.

In December 2014, a VA clinician reviewed the Veteran's claims file before offering an opinion as to whether the Veteran's lower back disability was the result of or otherwise related to his military service, to include two documented motor vehicle accidents that occurred while in service. In light of the fact that the examiner explicitly discussed those details outlined in the Board's remand in her rationale, including the service treatment records associated with the two in-service motor vehicle accidents, the Board finds that the RO substantially complied with the Board's remand directives as to the lower back disorder claim. *See Stegall v. West*, 11 Vet. App. 268, 271 (1998) (holding that a remand by the Board confers upon the Veteran, as a matter of law, the right to compliance with its remand instructions); *but see also D 'Aries v. Peake*, 22 Vet. App. 97, 105 (2008) (holding that only "substantial" as opposed to strict or exact compliance with the Board's remand directives is required under Stegall); *accord Dyment v. West*, 13 Vet. App. 141, 146-47 (1999).

In *Bryant v. Shinseki*, 23 Vet. App. 488 (2010), the United States Court of Appeals for Veterans Claims (CAVC) held that 38 C.F.R. § 3.103(c)(2) requires that the VLJ who conducts a hearing fulfill two duties to comply with the above the regulation. These duties consist of (1) the duty to fully explain the issues and (2) the duty to suggest the submission of evidence that may have been overlooked. Here, during the Board hearing in October 2010, the undersigned indicated that the hearing would focus on the issue of entitlement to service connection for lower back disorder. The undersigned noted that she discussed with the Veteran and his representative prior to the hearing the issue and the procedures for a hearing. The Veteran was assisted at the hearing by a representative from Veterans of Foreign Wars. The representative and the undersigned asked the Veteran questions regarding the history of symptoms associated with his lower back and specifically

highlighted the fact that he was involved in two motor vehicle accidents while in service. In addition, the representative noted that the record was missing service treatment records documenting his visits to the hospital following those accidents. The representative also identified records from two other veterans that were inexplicably contained in the Veteran's file. She asserted that the examiner who provided VA examinations in November 2006 and October 2007 inappropriately relied on these records in making her conclusions regarding the etiology of the Veteran's lower back disorder. Neither the Veteran nor his representative has suggested any deficiency in the conduct of the hearing. Therefore, the Board finds that, consistent with *Bryant*, the undersigned complied with the duties set forth in 38 C.F.R. § 3.103(c)(2).

VA has conducted medical inquiry in connection with the lower back injury claim in the form of VA compensation examinations in November 2006, October 2007, and December 2014. 38 U.S.C.A. § 5103A. As is discussed in further detail below, the Board finds that only the December 2014 opinion is adequate to decide the claim of entitlement to service connection for a lower back disorder. *Barr v. Nicholson*, 21 Vet. App. 303 (2007).

In recognition of these efforts by the RO to obtain the known evidence that may substantiate the Veteran's claim, and it being clear that the Veteran has not indicated that there exists additional evidence to support his claim, the Board concludes that no further assistance is required to be provided to the appellant in developing the facts pertinent to his service connection claim in order to comply with the duty to assist.

Legal Criteria

VA may grant service connection for disability resulting from disease or injury incurred in or aggravated by active duty. Service connection means that the facts, shown by evidence, establish that a particular injury or disease resulting in

disability was incurred during service, or, if the injury or disease preexisted such service, a showing that the injury or disease was aggravated therein. 38 U.S.C.A. §§ 1110, 1131; 38 C.F.R. § 3.303(a). Establishing that a purported injury or disease is connected to service, such that a veteran is entitled to potential benefits, requires competent and credible evidence of the following three things: (1) a current disability; (2) in-service incurrence or aggravation of a relevant disease or an injury; and (3) a causal relationship, *i.e.* a nexus, between the disease or injury in service and the current disability. *Holton v. Shinseki*, 557 F.3d 1362, 1366 (Fed. Cir. 2009).

Notwithstanding the above, service connection may be granted for any disease diagnosed after discharge, when all of the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d).

Where a Veteran served 90 days or more during a period of war or during peacetime service after December 31, 1946, and arthritis, as a chronic disease, becomes manifest to a degree of 10 percent or more within one year from the date of termination of such service, such disease shall be presumed to have been incurred in or aggravated by service, even though there is no evidence of such disease during the period of service. This presumption is rebuttable by affirmative evidence to the contrary. 38 U.S.C.A. §§ 1101, 1112, 1113, 1137; 38 C.F.R. §§ 3.307, 3.309(a). If a condition listed as a chronic disease in § 3.309(a) is noted during service, but is either shown not to be chronic or the diagnosis could be legitimately questioned, then a showing of continuity of related symptomatology after discharge is required to support the claim. 38 C.F.R. § 3.303(b); *Walker*, 708 F.3d at 1336.

The Board, as fact finder, must determine the probative value or weight of the admissible evidence. *Washington v. Nicholson*, 19 Vet. App. 362, 369 (2005) (citing *Elkins v. Gober*, 229 F.3d 1369, 1377 (Fed. Cir. 2000) ("Fact-finding in veterans cases is to be done by the Board.")).

VA must give due consideration to all pertinent medical and lay evidence in a case where a veteran is seeking service connection. 38 U.S.C.A. § 1154(a). When there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the matter, the benefit of the doubt in resolving each such issue shall be given to the veteran. 38 U.S.C.A. § 5107(b); 38 C.F.R. § 3.102.

Factual Background and Analysis

The Board has reviewed all of the evidence in the Veteran's record, with an emphasis on the evidence relevant to this appeal. Although the Board has an obligation to provide reasons and bases supporting its decision, there is no need to discuss, in detail, every piece of evidence. *Gonzales v. West*, 218 F.3d 1378. 1380-81 (Fed. Cir. 2000) (holding that VA must review the entire record, but has no concurrent obligation to discuss each piece of evidence in rendering a decision.). Accordingly, the Board will summarize the relevant evidence before it and focus its analysis on what that evidence illustrates about the Veteran's claim.

In conjunction with the Veteran's June 2006 formal claim of service connection for a lower back disorder he submitted a statement in which he related that he first injured his lower back while in service in 1963 when he was a passenger in a bus that was involved in a motor vehicle accident. The Veteran reported being hospitalized and treated for his lower back injury at a military facility. Thereafter, while still in service, he was afforded a "girdle back brace" which he stated he would wear beneath his uniform. Furthermore, he asserted that after his discharge he continued to wear the brace and experienced lower back pain. He reported that he had lower back surgery in 1968 but that the surgery was not successful and caused him to be in more pain than before. He then had another surgery in 1972 to remove scar tissue. He reported having another surgery following an injury in 1975 and indicated that he was in a body cast for eight months. This surgery still did not relieve his back pain, so he had another two surgeries, which he reported occurred

in 1996 and 1998. Since that point the Veteran reported that he did not have any more surgeries but continued to experience lower back pain. He indicated his belief that his back problems began with the bus accident.

The Veteran's service treatment records contain an in-service outpatient report dated in May 1963 which indicates that the Veteran was involved in a motor vehicle accident and reported that he was experiencing lower back pain at T12 following the accident. An X-ray examination was negative for any significant abnormality. Another outpatient report dated in February 1964 indicates that the Veteran was involved in a different motor vehicle accident and reported that he was experiencing pain in his neck. An X-ray examination revealed a cervical sprain.

Other than the two above-referenced reports, the Veteran's service treatment records are absent any complaints, treatment or diagnoses relating to a lower back disorder. Significantly, the Veteran's February 1966 separation examination does not note any problems related to a lower back injury, including based on the Veteran's history. On the separation examination, the Veteran was assigned a lower extremity profile of L1 under the PULHES classification system. The PULHES classification system reflects the overall physical and psychiatric condition of a veteran on a scale of 1 (high level of fitness) to 4 (a medical condition or physical defect which is below the level of medical fitness for retention in the military service). *See Odiorne v. Principi*, 3 Vet. App. 456, 457 (1992). Thus, the PULHES classification system provides a general indication of a veteran's level of fitness for retention in the military service, and the Lower Extremity factor covers the lower back musculature and lower spine. While a profile of "1" in a PULHES category does not necessarily mean that a veteran is free of all defect, infirmity, or disorder for that category, it is probative evidence tending to show that the Veteran did not have a recognized lower back injury at the point of his separation.

The Veteran has submitted private medical records which document his treatment for low back pain following service. A June 1989 X-ray examination report from

Catherine McCauley Health Center shows that a CT scan of the Veteran's lumbosacral spine revealed no disc herniation or significant indentation of the lower back. Thereafter, a July 1989 outpatient record from St. Joseph Mercy Hospital indicates that the Veteran initially complained of low back pain following a slip and fall accident at work in January 1989. That record notes that the Veteran reported having a spinal fusion surgery at L4-5 in 1985, and that a recent CT scan of the lower back demonstrated a decompression area in the same region as the fusion. Corresponding records also dated in July 1989 from St. Joseph show that the Veteran received a posterior bilateral lateral redo of the spinal fusion and was discharged with a diagnosis of pseudoarthrosis at L5-S1.

A June 1992 narrative summary from Catherine McCauley Health Center documents another slip and fall injury in January 1992. According to the summary, the Veteran underwent a CT scan of the lower back following the accident, which revealed scar tissue that the examiner suspected could be causing the chronic back pain that the Veteran was experiencing. The examiner also stated in the report that it was suspected that the Veteran had re-fractured the former fusion site at the lower back. A postoperative report dated in September 1992 indicates that the Veteran underwent posterior effusion augmentation L4 to S1 and posterior bone graft harvesting of the left iliac crest and was discharged with a diagnosis of possible pseudoarthritis.

Subsequent private medical records indicate that the Veteran had received care for chronic lower back pain in the years between his surgeries in 1989 and 1992 and 2006, when he began to receive care from VA medical facilities. According to medical records from Dr. P.M., the Veteran had another lower back surgery in 1994. Medical records from Dr. B.C. also reflect a diagnosis of degenerative arthritis of the lumbar spine.

The Veteran was afforded a VA examination in November 2006 in connection with his low back injury claim. During the examination, he related his history of back

injuries and treatment, including the multiple surgeries he underwent after service. At the time of the examination, he reported that he was experiencing a significant amount of chronic lower back pain that radiated down his left thigh. According to the Veteran, his pain was precipitated by walking, standing, or sitting for too long. He also asserted that he had difficulty walking for a long distance. After a physical examination and a review of the claims file, the November 2006 examiner opined that the Veteran's chronic low back pain originally developed as a result of the in-service motor vehicle accident and that the accident led to the five surgeries on his lumbar spine. The examiner offered no rationale for this opinion.

The Veteran was afforded another VA examination in October 2007 in connection with his low back injury claim. The examiner noted that the Veteran's medical records indicated that he experienced a back injury in 1989 following a slip and fall accident at work. After an extensive physical examination and a review of the claims file, the examiner diagnosed the Veteran with degenerative disc disease of the lumbar spine. The examiner then proceeded to opine that it was less likely than not that the Veteran's back condition was caused by or the result of an injury that occurred while in service. In support thereof, the examiner referred to the negative X-ray examination following the documentation in-service of the May 1963 motor vehicle accident that the Veteran asserted was the cause of his lower back pain at the time of the VA examination. The examiner also noted the fact that the Veteran's first lower back surgery was in 1968, merely two years after his separation from service.

The Veteran testified before the undersigned at a Travel Board hearing at the Detroit, Michigan RO in October 2010. During the hearing, he stated that he was involved in a motor vehicle accident in May 1963 while in service and experienced only minor injuries resulting from the accident. According to the Veteran, he was sent to the hospital at Andrews Air Force Base for two days and his neck was put in traction. He did not have any additional treatment that corresponded to the injuries from the May 1963 accident. Subsequent to that accident, the Veteran was a

passenger in a bus that was involved in a motor vehicle accident in February 1964. He asserted that he injured his lower back during the collision and was again sent to the hospital at Andrews Air Force Base, where his lower back was put into traction for eight days. When he was discharged from the hospital he was fitted for a back brace, which he wore underneath his uniform for the entire remaining period of his service. In addition, he was afforded physical therapy two days a week up until his separation from service.

Following his separation from service, the Veteran testified that he continued to have lower back problems. His private physician recommended he get a spinal fusion, and in 1968 he had his first lower back spinal fusion surgery. He reported this surgery did not relieve his pain and discomfort, and he was afforded another lower back spinal fusion surgery in 1970. In total, the Veteran asserted that he had five surgeries on his lower back since separation from service, with some being precipitated by his reinjuring the back while working on the job.

During the hearing, the Veteran's representative raised the contention that the Veteran's claims file contained records pertaining to another veteran and that the November 2006 and October 2007 examiners improperly relied on these mismatched records in arriving at their opinions. The representative related that she found these additional records in the claims file and alerted VA to this fact. The issue, in the eyes of the representative, was that it was impossible to determine to what extent the November 2006 and October 2007 VA examiners relied on those records in coming to their ultimate conclusions. However, the representative did note that the examiners cited to hospital records from hospitals at which the Veteran asserted he was not treated. Furthermore, the representative singled out the fact that the Veteran whose records were in the claims file had possible alcohol involvement and asserted that there was no way to know whether this improperly impacted the examiner's opinions.

The Veteran's claim file was most recently evaluated by a VA examiner in December 2014 for the purpose of providing an opinion as to the etiology of the lower back disorder. The examiner listed the Veteran's diagnosis as degenerative joint disease of the lumbar spine, and opined that the degenerative joint disease was less likely than not incurred in or caused by an in-service injury, to include the two reported motor vehicle accidents he was involved in while in service. Before laying out a rationale, the examiner first noted the lack of evidence in the claims file to corroborate the Veteran's reported injuries and his treatment with physical therapy and a back brace. The examiner also noted the lack of treatment records for the period immediately following service when the Veteran asserted he had two surgeries on his lower back.

As a rationale for the opinion, the examiner found that the Veteran's service treatment records documented his lower back injury as occurring at the T12 area, while his post-service spinal problems and surgery occurred at the L5 area. In addition, the examiner noted that the Veteran's service treatment records following those reports documenting the May 1963 and February 1964 injuries, including his separation examination, are negative for any complaints, diagnoses or treatment relating to a lower back injury. The examiner noted that the Veteran reported he had planned to stay in the military, but personal problems required him to take a hardship discharge. In summation, the examiner stated that there was not enough clinical information in the service treatment records to support that the Veteran injured his thoracic or lumbar spine severely enough to require the subsequent spinal fusion surgeries that began in 1968.

Upon consideration of the evidence before it, the Board finds that the preponderance of the evidence is against a finding that the Veteran's lower back disorder was incurred in service or was otherwise related to service. Before analyzing the merits of the appellant's claim, the Board must address the contentions raised by the Veteran's representative during the October 2010 hearing as to the wrong veteran's records being placed in the Veteran's claims file and the

possibility that the November 2006 and October 2007 VA examiners improperly relied on those records irrevocably compromises the probative value of those two opinions. Although the majority of the evidence reviewed by the November 2006 and October 2007 VA examiners actually pertained to the Veteran, the presence of another Veteran's documents in the claims file calls into question the validity of the resulting opinions, and thus significantly reduces the probative value of those two opinions. *See Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 303 (2008) (VA must ensure that a medical examiner's opinion is supported by sufficient evidence and that it does not necessarily rely solely on the claims file alone). Specifically, the October 2007 examination shows the Veteran as receiving treatment from two hospitals at which he asserted he never actually was treated. Under these circumstances, the Board cannot rely on either of these opinions in making its determination. The Board notes that the November 2006 opinion did positively relate the Veteran's low back pain to his in-service injury; however, no rationale was given for the opinion provided. Therefore, beyond whether the correct records were reviewed, the opinion also lacks significant weight of probative value in this regard.

The Board acknowledges that the appellant contends that the Veteran's lower back disorder was incurred in service and continued to cause him pain and discomfort after separation until his death in February 2013. While the Veteran's medical history clearly shows that the Veteran experienced symptoms of a lower back disorder following his separation from service, the fact remains that the appellant has provided no medical evidence in support of the assertion that the Veteran's post-service history of a low back disorder is related to his documented in-service back injury.

The Veteran, as a layperson, was competent to describe the symptoms of his lower back disorder, and there is no doubt that he had a lower back disorder for which he sought service connection. *Layno v. Brown*, 6 Vet. App. 465, 469 (1994). That being said, there is no evidence in the record which indicated that he was competent

enough through expertise or knowledge to conclude that his lower back disorder was incurred as a result of one or both of the in-service motor vehicle accidents or was otherwise related to service. *Jandreau v. Nicholson*, 491 F.3d 1372 (Fed. Cir. 2007). That type of medical determination is made through the use of clinical evaluations by a medical professional with the specialized education, training, or experience to offer an opinion regarding the etiology of a disease.

His assertion, now adopted by the appellant, that his lower back disorder was the result of one or both of the in-service motor vehicle accidents must be considered in light of the December 2014 VA examiner's opinion that the in-service motor vehicle accidents less likely than not caused his lower back disorder. As stated previously, a VA medical examiner's opinion must be supported by sufficient evidence and cannot necessarily rely solely on the claims file alone. *Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 303 (2008). A mere conclusory opinion is insufficient to allow the Board to make an informed decision as to the weight to assign to the opinion. *Stefl v. Nicholson*, 21 Vet. App. 120, 125 (2007). The probative value of a medical opinion is also generally based on the scope of the examination or review, as well as the relative merits of the analytical findings; the probative weight of a medical opinion may be reduced if the physician fails to explain the basis for an opinion. *Sklar v. Brown*, 5 Vet. App. 140 (1993).

Here, the December 2014 VA examiner's opinion is based on a thorough review of the claims file, with particular attention paid to the distinction between the type of injury reported in service and the history of post-service lower back problems. That is, the December 2014 VA examiner correctly noted that the Veteran's in-service back injury was reported as occurring at T12 while the Veteran's post-service records indicate that his post-service history of treatment focused on the L4 and L5 areas of the spine. Furthermore, following the documentation of the in-service injuries in May 1963 and February 1964, respectively, the Veteran's service treatment records do not contain any further documentation relating to a lower back disorder. This includes the February 1966 separation examination and medical

history report, in which the examiner did not record any lower back problems and the Veteran did not report any history of lower back pain. The Board therefore finds that the VA examiner's opinion that found it less likely than not that the Veteran's lower back disorder was incurred in or otherwise caused by service to be a more reliable indicator of whether the Veteran's degenerative arthritis or degenerative disc disease of the lower back was attributable to the Veteran's service, to include the two documented in-service motor vehicle accidents. Accordingly, the Board concludes that the preponderance of the evidence is against the appellant's claim of service connection for a lower back disorder on a direct basis. 38 C.F.R. § 3.303(a).

As arthritis is not shown to have been manifested in the first postservice year, the chronic disease presumptive provisions of 38 U.S.C.A. §§ 1112, 1113, 1137; 38 C.F.R. §§ 3.307, 3.309 do not apply. While continuity of symptomatology can constitute the required nexus for establishing that arthritis is of service origin, in this case continuity of symptomatology is interrupted by evidence of the Veteran's numerous postservice injuries and surgeries. The belief that his low back disability was related to his post-service symptomatology, given the history complicated by such injuries and surgeries extends beyond an immediately observable cause-and-effect relationship to which a lay person's observation is competent. As such, to the extent the Veteran's statements addressed the theory of continuity of symptomatology, they are not competent evidence to address the linkage element of the continuity-of-symptoms inquiry in the present case. *See Woehlaert v. Nicholson*, 21 Vet. App. 456 (2007).

The appellant may still be entitled to service connection for lower back disorder if all of the evidence establishes that the Veteran's disorder was incurred in service. 38 C.F.R. § 3.303(d). However, in recognition of the absence of evidence tending to show incurrence in service and the distinction between the area of focus in the in-service records (T12) and the post-separation records (L4 and L5), the Board finds that the preponderance of the evidence weighs against a finding that the Veteran's

lower back disorder was otherwise attributable to service. *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990). A preponderance of the evidence is also against the claim under 38 C.F.R. § 3.303(d).

In summary, as the preponderance of the evidence is against the appellant's service connection claim, the benefit-of-the-doubt standard of proof does not apply, and the claim is denied. 38 U.S.C.A. § 5107(b).

ORDER

Service connection for a lower back disorder is denied.

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M. SORISIO
Acting 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).