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

IN THE APPEAL OF [redacted]
LLOYD T. DECENT

DOCKET NO. 06-06 684) DATE October 25, 2016
) SDM
)

On appeal from the
Department of Veterans Affairs Regional Office in Lincoln, Nebraska

THE ISSUES

1. Entitlement to an effective date prior to April 27, 2010 for the grant of service connection for ischemic heart disease.

2. Entitlement to an effective date prior to August 24, 2011 for the grant of a total disability rating based on individual unemployability due to service-connected disabilities (TDIU).

3. Entitlement to service connection for a gastrointestinal disability, claimed as secondary to PTSD.

REPRESENTATION

Appellant represented by: John Berry, Associate Counsel

IN THE APPEAL OF [redacted]
LLOYD T. DECENT

ATTORNEY FOR THE BOARD

Brandon A. Williams, Associate Counsel

INTRODUCTION

The Veteran served on active duty from September 1968 to September 1971. His awards and decorations include the Combat Infantryman's Badge.

These matters come before the Board of Veterans' Appeals (Board) on appeal from June 2005, December 2011 and June 2014 rating decisions issued by the Department of Veterans Affairs (VA) Regional Office (RO) in Lincoln, Nebraska.

In June 2014 the Board issued a decision in regard to the claim for service connection and for TDIU, in which it granted the Veteran's claim for TDIU from August 24, 2011. The Board remanded the issue of entitlement to a TDIU prior to August 24, 2011 for further development. The Board also remanded the issue of entitlement to an effective date prior to April 27, 2010 for the grant of service connection for ischemic heart disease for a supplemental opinion as to when the Veteran's ischemic heart disease first manifested. A review of the claims folder reflects that the RO has complied with the June 2014 remand instructions by obtaining a supplemental medical opinion in September 2014, an addendum opinion in March 2016, and subsequently issuing a supplemental statement of the case (SSOC) in May 2016.

The issue of entitlement to service connection for a gastrointestinal disability, claimed as secondary to PTSD was denied by the Board in a June 2014 decision. The Veteran appealed the decision to the United States Court of Appeals for Veterans Claims (Court). In a February 2016 Memorandum Decision, the Court vacated the Board decision in part and remanded the claim.

The issues of entitlement to an effective date prior to August 24, 2011 for TDIU and entitlement to service connection for a gastrointestinal disability, claimed as secondary to PTSD are addressed in the REMAND portion of the decision below and are REMANDED to the Agency of Original Jurisdiction (AOJ).

FINDINGS OF FACT

1. The Veteran's original claim for entitlement to service connection for ischemic heart disease was received by VA in March 2006.

2. The Veteran's original claim for entitlement to service connection for ischemic heart disease was granted in October 2011, and revised in December 2011 granting service connection with an effective date of April 27, 2010.

3. The Veteran was diagnosed with ischemic heart disease on April 27, 2010.

4. The competent credible evidence of record is against a finding that the Veteran is entitled to an effective date earlier than April 27, 2010 for entitlement to service connection for ischemic heart disease.

CONCLUSION OF LAW

The criteria for an effective date earlier than April 27, 2010 for entitlement to service connection for ischemic heart disease have not been met. 38 U.S.C.A. §§ 5103, 5103A, 5107, 5110 (West 2014); 38 C.F.R. §§ 3.102, 3.159, 3.400 (2015).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

VA has duties to notify and assist claimants in substantiating a claim for VA benefits. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126; 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.326(a). *See also Pelegrini v. Principi*, 18 Vet. App. 112

(2004); *Quartuccio v. Principi*, 16 Vet. App. 183 (2002); *Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006); *Dingess v. Nicholson*, 19 Vet. App. 473 (2006). Notice was provided to the Veteran in August 2011 and April 2005.

VA has a duty to assist the Veteran in the development of the claim. The claims file includes service treatment records (STRs), VA medical records, private medical records, and statements in support of the Veteran's claims. The Board has considered the statements and perused the medical records for references to additional treatment reports not of record, but has found nothing to suggest that there is any outstanding evidence with respect to the Veteran's claims for which VA has a duty to obtain.

VA opinions were obtained in September 2014 and March 2016. When VA undertakes to provide a VA examination or obtain a VA opinion, it must ensure that the examination or opinion is adequate. *Barr v. Nicholson*, 21 Vet. App. 303, 312 (2007). The Board finds that the Veteran has been afforded an adequate VA examination/opinion. The report includes a clinical examination, diagnostic testing, and the Veteran's reported symptoms. The report provides findings, and adequate rationale, relevant to the criteria for the claimed conditions.

Based on the foregoing, the Board finds that all relevant facts have been properly and sufficiently developed in this appeal and no further development is required to comply with the duty to assist the Veteran in developing the facts pertinent to the claims. Essentially, all available evidence that could substantiate these claims has been obtained.

Earlier effective date prior to April 27, 2010 for the grant of service connection for ischemic heart disease

Legal Criteria

The general rule regarding effective dates is that the effective date of an evaluation and award of compensation based on an original claim, a claim re-opened after final

disallowance, or a claim for increase will be the date of receipt of the claim or the date entitlement arose, whichever is the later. 38 C.F.R. § 3.400 (2015).

A specific claim in the form prescribed by the Secretary of Veterans Affairs must be filed in order for benefits to be paid to any individual under the laws administered by VA. 38 C.F.R. § 3.151 (2015). The term "claim" or "application" means a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief of entitlement, to a benefit. 38 C.F.R. § 3.1 (p) (2015). "Date of receipt" generally means the date on which a claim, information, or evidence was received by VA. 38 C.F.R. § 3.1 (r). Any communication or action indicating an intent to apply for a benefit may be considered an informal claim. 38 C.F.R. § 3.155 (2015).

Any communication or action, indicating an 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 an informal claim must identify the benefit sought. Upon receipt of an informal claim, if a formal claim has not been filed, an application form will be forwarded to the claimant for execution. If received within one year after the date it was sent to the claimant, it will be considered filed as of the date of receipt of the informal claim. 38 C.F.R. § 3.155 (a).

Analysis

The Veteran is seeking an effective date prior to April 27, 2010 for the award of service connection for ischemic heart disease. In March 2006, the Veteran submitted correspondence informing VA that he had undergone an electrocardiogram (ECG) in January 2005. In a December 2011 rating decision, VA construed the Veteran's March 2006 letter as a claim for service connection.

As noted above, the effective date of an award based on an original claim for compensation benefits shall be the date of receipt of the claim or the date entitlement arose, whichever is later. 38 U.S.C.A. § 5110 (a) (2015). While the

Veteran contends that he is entitled an effective date prior to April 27, 2010, the claims folder does not support that position.

The claims folder does not reflect, and the Veteran does not contend, that he has claimed service connection for ischemic heart disease prior to March 2006. Further, the claims folder reflects that prior to April 2010; the Veteran had not been diagnosed with ischemic heart disease.

A medical opinion was obtained by VA in September 2014. After reviewing the claims folder, to include the Veteran's medical records, the examiner opined that the absolute proof that ischemia presented itself was noted in an April 28, 2010 Lexiscan, which showed true ischemia. In further support of the medical conclusion, the examiner noted the August 2011 VA medical examination, in which the Veteran conceded that he was first diagnosed with ischemic heart disease in 2010.

An addendum was obtained by VA in March 2016. Noting the Veteran's medical history, the cardiologist concluded that the Veteran's diagnosis and ischemic heart disease first manifested in 2010. The cardiologist explained that while the Veteran has complained of chest pain in the past, it could have been due to other reasons. The cardiologist further noted that stress tests administered in 2008 were normal suggesting no ischemic heart disease at the point. Additionally, the addendum noted a January 2009 chest x-ray which revealed the Veteran with a normal heart and lungs.

In this case, the record does not reflect competent evidence that the Veteran's ischemic heart disease manifested prior to April 27, 2010, and there is competent evidence indicating that this is the earliest manifestation. As this is the earliest date the disability manifest, an earlier effective date is not warranted.

Based on the above, the Board finds that there are no statements by the Veteran, or clinical records, which would entitle the Veteran to an earlier effective date for the grant of service connection for ischemic heart disease. As the preponderance of the

evidence is against the claim, the benefit of the doubt rule is not applicable. 38 U.S.C.A. §5107 (b); *Gilbert v. Derwinski*, 1 Vet. App. 49, 54-56 (1990).

ORDER

Entitlement to an effective date prior to April 27, 2010 for the grant of service connection for ischemic heart disease is denied.

REMAND

As noted above, in February 2016, the Court vacated the Board's June 2014 decision denying the Veteran's claim to service connection for a gastrointestinal disability on a secondary basis. Importantly, the Court affirmed the Board's decision in denying service connection for a gastrointestinal disability on a direct basis. However, the Court found that the VA medical examinations and opinions on record to be inadequate. In its decision, the Court concluded that a supplemental opinion must be obtained to discuss the Veteran's relationship between his current gastrointestinal disability and his current medication regimen, to include sertraline.

As such, the Board in compliance with the Court's remand finds the previous VA opinions on record to be inadequate and must remand for a supplemental opinion discussing the examiner's determination, which considers the entire claims folder. *See Barr v. Nicholson*, 21 Vet. App. 303, 312 (2007). (When VA undertakes to provide a VA examination or obtain a VA opinion, it must ensure that the examination or opinion is adequate).

In regard to the issue of entitlement to an effective date prior to August 24, 2011 for TDIU, the Board finds the issue to be inextricably intertwined with the issue of service connection for a gastrointestinal disability on a secondary basis, and cannot be adjudicated at this time. *See Harris v. Derwinski*, 1 Vet. App. 180 (1991) (two issues are "inextricably intertwined" when they are so closely tied together that a final decision on one issue cannot be rendered until a decision on the other issue has

been rendered). Specifically, the outcome of the claim for service connection for a gastrointestinal disability on a secondary basis could have an effect on the Veteran's effective date for TDIU.

Accordingly, the case is REMANDED for the following action:

> 1. Provide the Veteran the opportunity to identify any pertinent outstanding treatment records, both VA and private, for his gastrointestinal disability. The AOJ should secure any necessary authorizations. The Veteran shall be informed of his right to request a hearing in order to identify what evidence is necessary to substantiate his claim. If any requested outstanding records cannot be obtained, the Veteran should be notified of such.
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> 2. After associating all newly acquired records with the claims file, obtain a supplemental clinical opinion. The clinician is requested to furnish an opinion as to whether it is at least as likely as not (50 percent or greater) that the Veteran's gastrointestinal disability is related to, or aggravated (chronically worsened) by, any of his service-connected disabilities, to include any medications prescribed for his service-connected disabilities.
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> Any opinion should include a complete rationale. The clinician should consider the entire claims. If the clinician cannot provide an opinion without another examination, the Veteran should be scheduled for such.
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> If the examiner is unable to provide an opinion without resorting to speculation, the examiner must clearly explain why the Veteran's medical history and/or condition prevents such an opinion from being provided.

> 3. After undertaking any other development deemed appropriate, readjudicate the issues on appeal. If any of the benefits sought on appeal are not granted, issue a supplemental statement of the case and provide the Veteran, and his representative, with an appropriate opportunity to respond. The case should then be returned to the Board for further appellate consideration.

The appellant has the right to submit additional evidence and argument on the 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).

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MILO H. HAWLEY
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

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).