

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

IN THE APPEAL OF
REYES PEREGRINO



DOCKET NO. 10-17 984

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DATE *December 30, 2016*
JDG

On appeal from the
Department of Veterans Affairs Regional Office in Houston, Texas

THE ISSUE

Entitlement to service connection for an acquired psychiatric disorder to include posttraumatic stress disorder (PTSD).

REPRESENTATION

Appellant represented by: Disabled American Veterans

WITNESS AT HEARING ON APPEAL

Appellant

ATTORNEY FOR THE BOARD

Robert J. Burriesci, Counsel

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INTRODUCTION

The Veteran served on active duty from July 2000 to March 2008.

This matter comes to the Board of Veterans' Appeals (Board) on appeal from a July 2008 rating decision by a Regional Office (RO) of the Department of Veterans Affairs (VA).

The Veteran presented testimony at a Board hearing in January 2015, and a transcript of the hearing is associated with his claims folder.

The claim was previously before the Board in March 2015 when it was remanded for further development. The Board is satisfied that there has been substantial compliance with the remand directives and the Board may proceed with review. *Stegall v. West*, 11 Vet. App. 268 (1998).

This appeal has been advanced on the Board's docket pursuant to 38 C.F.R. § 20.900(c) (2016). 38 U.S.C.A. § 7107(a)(2) (West 2014).

FINDING OF FACT

There has been no demonstration by competent medical, nor competent and credible lay, evidence of record that the Veteran has an acquired psychiatric disorder related to service, including the reported stressor events therein.

CONCLUSION OF LAW

The criteria for entitlement to service connection for an acquired psychiatric disorder are not met. 38 U.S.C.A. §§ 1131, 5107 (West 2014); 38 C.F.R. §§ 3.303, 3.304 (2016).

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REASONS AND BASES FOR FINDING AND CONCLUSION

With respect to the Veteran's claim herein, VA has met all statutory and regulatory notice and duty to assist provisions. *See* 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5106, 5107, 5126; 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326; *see also Scott v. McDonald*, 789 F.3d 1375 (Fed. Cir. 2015). Pursuant to the Board's remand instructions, VA contacted the Veteran and requested that he complete a PTSD questionnaire and either provide consent for VA to obtain records from a specific medical provider or submit those records himself. The Veteran did not respond to the April 2015 correspondence.

Under the relevant laws and regulations, service connection may be granted for a disability resulting from disease or injury incurred in or aggravated by active service. 38 U.S.C.A. §§ 1110, 1131.

Establishing service connection generally requires medical evidence or, in certain circumstances, lay evidence of the following: (1) A current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) nexus between the claimed in-service disease and the present disability. *See Davidson v. Shinseki*, 581 F.3d 1313 (Fed. Cir. 2009); *Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007); *Hickson v. West*, 12 Vet. App. 247 (1999); *Caluza v. Brown*, 7 Vet. App. 498 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

In each case where a Veteran is seeking service connection for any disability, due consideration shall be given to the places, types, and circumstances of such Veteran's service as shown by such Veteran's service record, the official history of each organization in which such Veteran served, such Veteran's treatment records, and all pertinent medical and lay evidence. 38 U.S.C.A. § 1154 (a).

For certain chronic disorders, to include psychosis, service connection may be granted if the disease becomes manifest to a compensable degree within one year following separation from service. 38 U.S.C.A. §§ 1101, 1112, 1113; 38 C.F.R. §§ 3.307, 3.309.

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In order to establish service connection for PTSD, the evidence of record must include a medical diagnosis of the condition in accordance with 38 C.F.R. § 4.125 (a); a link, established by medical evidence, between current symptoms and an in-service stressor; and credible supporting evidence that the claimed in-service stressor occurred. 38 C.F.R. § 3.304 (f).

The law provides that “[i]f the evidence establishes that the Veteran engaged in combat with the enemy and the claimed stressor is related to that combat, in the absence of clear and convincing evidence to the contrary, and provided that the claimed stressor is consistent with the circumstances, conditions, or hardships of the Veteran's service, the Veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.” 38 C.F.R. § 3.304 (f)(2).

Where, however, VA determines that the Veteran did not engage in combat with the enemy, or that the Veteran did engage in combat with the enemy but the claimed stressor is unrelated to such combat, the Veteran's lay testimony, by itself, will not be enough to establish the occurrence of the reported stressor. Instead, the record must contain evidence that corroborates the Veteran's testimony as to the occurrence of the claimed stressor. *See* 38 U.S.C.A. § 1154 (b); 38 C.F.R. § 3.304 (d), (f); *West v. Brown*, 7 Vet. App. 70, 76 (1994).

In making all determinations, the Board must fully consider the lay assertions of record. A layperson is competent to report on the onset and continuity of his current symptomatology. *See Layno v. Brown*, 6 Vet. App. 465 (1994). Lay evidence can also be competent and sufficient evidence of a diagnosis or to establish etiology if (1) the layperson is competent to identify the medical condition, (2) the layperson is reporting a contemporaneous medical diagnosis, or (3) lay testimony describing symptoms at the time supports a later diagnosis by a medical professional. *Davidson*, 581 F.3d at 1313; *Jandreau*, 492 F.3d at 1372. When considering whether lay evidence is competent the Board must determine, on a case by case basis, whether the Veteran's particular disability is the type of disability for which lay evidence may be competent. *Kahana v. Shinseki*, 24 Vet. App. 428 (2011).

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The Board is charged with the duty to assess the credibility and weight given to evidence. *Madden v. Gober*, 125 F.3d 1477 (Fed. Cir. 1997), *cert. denied*, 523 U.S. 1046 (1998); *Wensch v. Principi*, 15 Vet. App. 362, 367 (2001).

As a finder of fact, when considering whether lay evidence is satisfactory, the Board may also properly consider internal inconsistency of the statements, facial plausibility, consistency with other evidence submitted on behalf of the Veteran, and the Veteran's demeanor when testifying at a hearing. *See Dalton v. Nicholson*, 21 Vet. App. 23, 38 (2007); *Caluza v. Brown*, 7 Vet. App. 498, 511 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996).

When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim. 38 C.F.R. § 3.102.

The Veteran seeks entitlement to service connection for an acquired psychiatric disorder.

Military service records include performance reports regarding the Veteran. The Veteran's performance reports indicated that he met standards or was above standards during the entire period of service, including during the period March to September 2006. The performance reports continue to reveal meeting standards and being above standards in 2008. The Veteran's personnel records reveal that he was stationed at NAS Sigonella, Italy from October 2003 to October 2004, and to a date in September 2006.

Service treatment records reveal that the Veteran reported no nervous trouble on a Report of Medical History at separation from service in March 2008.

A Recommendation for Award dated in August 2006 indicates that the Veteran served at Camp Buehring in Kuwait. The statement reported that his duties resulted

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in the detachment's smooth integration to a combat asset under the U.S. Third Army. It was noted that his actions directly contributed to the detachment achieving a 94 percent full mission capable rate and a 94 percent mission capable rate while accumulating over 900 combat support flight hours under the U.S. Third Army in direct support of Operation Iraqi Freedom.

The Veteran was afforded a VA medical examination in December 2009. The examiner reported that the Veteran served in the Navy, served during the Iraq War, and was in Kuwait for six months in 2006. The examiner noted that the Veteran was involved in combat. The Veteran reported that after he returned from Kuwait in 2006, he was always on edge. He was extremely paranoid and vigilant and was unable to relax. As a result he started drinking heavily. The Veteran reported that he was employed and was doing reasonably well in his job. Besides his job he reported no social life. He had problems with his sleep. The Veteran reported no problems prior to joining the service. Military history was noted to indicate that his occupation was aviation electrician. The examiner noted that the Veteran received the Good Conduct Medal, National Defense Service Medal, Global War on Terrorism Service Medal, Global War on Terrorism Expeditionary Medal, Overseas Service Ribbon, Sea Service Deployment Ribbon, Army Achievement Medal, and Meritorious Unit Commendation. The examiner noted that the Veteran did not have any disciplinary problems in service and that the Veteran had war zone duty in Kuwait for seven months in 2006. The examiner noted that the Veteran was involved in combat. Post service the Veteran was noted to be employed. He reported that he did not have much initiative to do anything socially. He preferred to keep to himself and did not go out much. The Veteran admitted to drinking heavily after he came back from Kuwait. After mental status examination the Veteran was diagnosed with anxiety disorder, not otherwise specified, and alcohol abuse. The examiner noted that the claimant's alcohol abuse was secondary to his primary service connected anxiety disorder. The examiner provided no rationale for the opinion provided.

At the hearing before the undersigned in January 2015 the Veteran reported that he witnessed a helicopter accident and had heard about others.

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In VA treatment records from March 2016, the Veteran was noted to meet the criteria for PTSD and a diagnosis was “suggested.” The provider specifically noted that the information was based on a self-report assessment and was not sufficient to use alone for diagnostic purposes. In April 2016 the assessment was unspecified anxiety disorder; unspecified trauma and stressor related disorder, rule out PTSD; major depressive disorder; and history of cannabis and alcohol use. The stressors identified were helicopter crashes in service. The provider also noted that the Veteran reported additional trauma, including: childhood physical abuse; witnessing a shooting as a child; witnessing a stranger stabbed; witnessing a fatal car accident as a teenager; learning his ex-wife and children had been robbed at gunpoint (the Veteran was not present at that time). In June 2016 the Veteran was diagnosed with major depressive disorder, unspecified anxiety disorder, and unspecified trauma and stressor related disorder, rule out PTSD.

Pursuant to the Board remand, the Veteran was afforded a VA examination in September 2016. The Veteran was noted to be diagnosed with alcohol use disorder, mild. The Veteran reported stressors of helicopter crashes. The first was when he was in school for training and heard about the crash. The second was a year later. He was noted to have witnessed the crash. He was 300 to 400 yards away and watched the helicopter lift up and crash down with the tail separating. The third was six or seven months later and occurred just before he arrived at work. The fourth was in 2008 and a friend which whom he had previously been stationed was killed. He was not involved with that accident and was not around when it occurred. He reported that the Veteran felt guilt and second guessing every day. The Veteran reported that he was anxious and that this began in 2006 when he returned from Kuwait. He attributed domestic violence to not being able to control himself. He was drinking a lot and was not able to control his anger.

After examination the examiner found that the Veteran did not meet the criteria for a diagnosis of PTSD. The Veteran reported the occurrence of at least four helicopter crashes during his military service; however, the examiner found that they did not meet the specifications for a diagnosis of PTSD. The Veteran said he had/may have worked on the helicopters that crashed before they went into service and each time a helicopter crashed, he wondered if he'd been involved on the

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maintenance crew. The examiner noted that the Veteran was not involved in any crashes. He did not witness three of the four crashes. There were no casualties on two of the four crashes. The crash that he deemed the “worst one” was not witnessed. He said it was the worst because the crew died and because he wasn't used to such events. The Veteran's friend died in a crash at a later date. The Veteran had not been involved with the maintenance crew for this craft and he wasn't in the vicinity when the crash occurred. The Veteran was noted to have reported symptoms, some vague, that could not be related to his reported stressors. He stated that he experiences guilt related to “the things we did overseas.” He reported that he had a short fuse with “stupid stuff.” He stated that he was doing well in college but he had difficulty applying what he learned and he began to have problems as the material became more difficult. He stated that he was trying to find what he lost in the military and when asked about a history of mental health problems in the military, he reported, “[t]oward the end but nothing serious or nothing diagnosed or anything like that. It's more or less just looking back I can see . . . things I didn't know were issues.” The Veteran said that he interacted fine with people when they engage him first and that his ability to control his anger depends upon who was pushing his buttons. He related several of his symptoms to difficulty adjusting to civilian life, to include lack of a structured environment and to changes with respect to his marital and employment status. The examiner noted that the Veteran met criteria for alcohol use disorder, mild based on social or interpersonal problems related to alcohol consumption; using in physically hazardous situations; and tolerance. The examiner found that it was less likely than not that the disorder was related to his reported stressors. The Veteran stated that he began drinking “normal” at age 24 but the drinking increased after he got out of the military at which time he said he was trying to escape. He was unable to articulate what he was trying to escape: “I don't know. I don't know. Just bad experiences. I don't know why to be honest with you.” The Veteran reported that he currently drank to get drunk and to forget about life's problems, to include bad experiences in military and everything that has changed since he's been back, such as losing job and family.

In a statement received in October 2016 the Veteran reported that his stressors included a helicopter crash in his squadron in 2003. He reported that he was not present but heard about it from his instructor at the time. He reported a crash in

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2004. He stated that he was walking into work and everybody was running around instead of doing the normal shift change routine. He was told that a helicopter had gone down 20 minutes prior to his arrival. He reported that he still wondered about the last thing he touched on the helicopter and a lingering doubt. He stated that six to eight months later he personally witnessed a helicopter accident. He was not permitted to help and waited for six to seven hours to hear news. After that he reported he was deployed to Kuwait from January 2006 to August 2006. The Veteran reported that he was not involved in any direct combat but they were given weapons and sent on escort missions. He heard explosions in close proximity and reported that his aircrew was fired upon during combat support missions into Iraq. He reported that later he heard of the death of other friends and stressed how small the helicopter community was. The Veteran stated that VA providers have diagnosed him with PTSD. He stated that he has lost jobs, his marriage, his home, and his children because he could not deal with the anger and frustration that has built up during the years. He reported that he had not been keeping up with his hygiene except when he knew he was going to be around someone who would notice.

The Veteran submitted articles identifying a helicopter crash in July 2003, February 2005, January 2008, and July 2012.

In a statement received in October 2016, the Veteran's ex-wife indicated that the Veteran changed after the several accidents at work and after he returned from Kuwait. He became angry, would lose his temper, became withdrawn, began drinking, and became violent.

The Board finds that entitlement to service connection for an acquired psychiatric disorder is not warranted. During the period on appeal the Veteran has been variously diagnosed with PTSD, anxiety disorder, major depressive disorder, and alcohol use disorder. The Veteran has consistently reported helicopter crashes as the stressors precipitating his psychiatric complaints and has provided articles related to these accidents. In addition, it is acknowledged that the Veteran served in Kuwait. In December 2009 a VA examiner rendered the opinion that the Veteran had a "service connected" anxiety disorder; however, as noted in the prior Board

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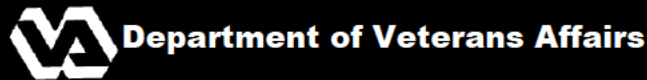
remand, as the examiner did not provide any rationale for the opinion, it lacks probative value. The Veteran was again afforded a VA examination in September 2016. The examiner diagnosed the Veteran with alcohol use disorder, mild, and found that the Veteran did not have a diagnosis of PTSD. In reaching this diagnosis the examiner considered and discussed the Veteran's reported stressors and found that they did not meet the criteria for diagnosis of PTSD. The examiner also considered the Veteran's reports of being anxious in 2006 when he returned from Kuwait. The Board notes that it is not clear whether the Veteran served in combat. The service personnel records indicate the Veteran's duties resulted in his detachment's smooth integration to a combat asset and directly contributed to his detachment's ability to accumulate over 900 combat support flight hours. However, even assuming for argument that the Veteran's reported stressors were due to combat, the stressors were considered by the examiner and found to be insufficient to support a diagnosis of PTSD. Further, although the Veteran has indicated that he has had anxiety since 2006 and his ex-wife has reported that he was changed after he returned from Kuwait; the Veteran did not report any nervous trouble on his Report of Medical History at separation. The Board finds the contemporaneous reports of no nervous trouble more probative than the subsequent statements by the Veteran and his ex-wife regarding anxiety. Thus, there is no indication, other than the Veteran's reports, that the Veteran has a psychiatric disorder related to his active service and service connection for an acquired psychiatric disorder is denied.

ORDER

Entitlement to service connection for an acquired psychiatric disorder to include PTSD, is denied.

M. E. LARKIN

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.cave.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).