UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

FRAZIER FOREMAN,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 15-3463
	)	
DAVID J. SHULKIN, M.D.,	)	
SECRETARY OF VETERANS AFFAIRS,	)	
	)	
Appellee.	)	

BRIEF FOR AMICUS CURIAE VETERANS CONSORTIUM PRO BONO PROGRAM IN SUPPORT OF APPELLANT

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RECORD BEFORE THE AGENCY

Pursuant to Vet. App. R. 29 and the Court's March 21, 2017 order, the Veterans Consortium Pro Bono Program hereby submits this brief as amicus curiae in support of Appellant Frazier Foreman ("Appellant").

INTEREST OF AMICUS

The Veterans Consortium Pro Bono Program ("the Consortium") was created at the request of this Court to address the inherent injustice in the fact that approximately 80% of the veterans appearing before the Court did not have legal representation. The Consortium's mission is twofold: (1) To provide assistance to unrepresented veterans or their family members who have filed appeals at the U.S. Court of Appeals for Veterans Claims (Court); and (2) to recruit and train attorneys in the field of veterans' law. The Consortium consists of four veterans service organizations: The American Legion, Disabled American Veterans, the National Veterans Legal Services Program, and Paralyzed Veterans of America. The Executive Board of the Consortium is composed of representatives of the four veterans' service organizations along with members of the private bar. The Consortium is funded by a Congressional appropriation and a grant administered by the Legal Services Corporation, plus donated time and money from the four veterans' service organizations.

The Consortium trains and assigns volunteer attorneys to represent veterans or their loved ones appealing adverse Board of Veterans Appeals decision to the U.S. Court of Appeals for Veterans Claims. The program's staff of veterans law specialists screen the appeals of individuals who file pro se at the Court and refer appeals with merit to

trained volunteer attorneys. The Consortium, through its network of volunteer attorneys, assists thousands of veterans each year in their efforts to obtain deserved benefits.

The VA's treatment of 38 CFR § 3.304(f)(3) as a "liberalizing law" adversely affects many of the individuals whose interests the Consortium was established to represent. Under the VA's interpretation, a veteran whose entitlement to service connected disability compensation benefits for a PTSD disability is established in part by 38 CFR § 3.304(f)(3) would inappropriately be assigned an effective date no earlier than July 13, 2010—the date the regulation was adopted. As many veterans continue to pursue service connected disability compensation benefits claims for their PTSD disabilities that were pending prior to July 13, 2010, the Consortium has an interest in correcting the VA's error in this matter.

STATEMENT OF FACTS

Appellant Frazier Foreman is a disabled Vietnam veteran who suffers from posttraumatic stress disorder ("PTSD"). Mr. Foreman served on active duty in the United States Army from August 1970 to August 1972, including service in Vietnam. RBA 3 (RBA 2-8), RBA 47. While in service, Mr. Foreman was awarded the National Defense Service Medal, the Vietnam Service Medal, the Republic of Vietnam Campaign Medal w/60 device, and the Good Conduct Medal. *Id.* He was honorably discharged. *Id.*

Mr. Foreman was diagnosed by the VA with a PTSD disability in 2005 and, again, in 2006. RBA 4 (RBA 2-8); RBA 723; RBA 980, 983, 984, 985 (RBA 972-92). And he identified the sight of dead bodies in Vietnam as the in service stressor related to his PTSD. RBA 4 (RBA 2-8). In September 2008, Mr. Foreman filed an application for service-connected disability compensation benefits. RBA 3 (RBA 2-8).

While Mr. Foreman's claim was pending, on July 13, 2010, the VA amended 38 CFR § 3.304(f) to liberalize the evidentiary standard for establishing the in-service stressor component of a service connected disability compensation benefits claim based on PTSD. *See* Stressor Determinations for Posttraumatic Stress Disorder, Final Rule, 75 Fed. Reg. 39843-901, 39851 (July 13, 2010).

Subsequently, the VA failed to diagnose Mr. Foreman with PTSD during a September 2010 examination. RBA 4 (RBA 2-8); RBA 220 (RBA 218-21); RBA 684-89. But Mr. Foreman was provided another examination in March 22, 2011, and—consistent with the VA's 2005 and 2006 diagnoses—was again diagnosed with PTSD. RBA 5 (RBA 2-8); RBA 220 (RBA 218-21); RBA 568-69 (RBA 568-72). Thereafter, in

November 2012, the RO granted service connection for PTSD "pursuant to the liberalized regulation" and assigned an effective date of March 22, 2011—the date of Mr. Foreman's then most-recent diagnosis of PTSD. RBA 5 (RBA 2-8); RBA 218, 220 (RBA 218-21). Mr. Foreman disagreed with the assigned effective date and appealed his claim to the Board of Veterans Affairs. RBA 5 (RBA 2-8).

On appeal, the Board determined that the VA's September 2010 treatment report concluding that Appellant was not suffering from PTSD was "erroneous[]," thus apparently concluding that Appellant had shown PTSD due to the April 2005 and June 2006 VA diagnoses. But instead of awarding an effective date of September 2008, the Board instead held that Appellant's award of entitlement to service connection was "granted pursuant to the liberalizing law" and that Appellant somehow had met all eligibility criteria only *as of the date of that law*. RBA 3-5 (RBA 2-8). The Board then awarded an effective date of July 13, 2010. *Id.*

Mr. Foreman challenges this finding, and argues that he is entitled to an effective date of September 2008, when he first filed his claim for service connected disability compensation benefits for his PTSD disability.

SUMMARY OF ARGUMENT

Posttraumatic stress disorder (PTSD) is a common and devastating disorder that impacts a large portion of the veterans community. Unfortunately, despite the prevalence and severity of the issue, the VA has long struggled to adequately address affected veterans' entitlement to service connected disability compensation benefits.

The VA's promulgation of 38 C.F.R. § 3.304(f)(3) was intended to improve this situation by eliminating the requirement that veterans suffering PTSD submit corroborating evidence of the in-service stressor(s) that resulted in their PTSD.

Nonetheless, although the regulation is procedural in nature, and does not create additional substantive benefits, the Board—in this case—treated the regulation as a "liberalizing law" and held that Mr. Foreman was entitled to an effective date for payment of benefits no earlier than the date § 3.304(f)(3) was promulgated. But the Board's decision to treat § 3.304(f)(3) as a "liberalizing law" in this case is contrary to Federal Circuit precedent and sound policy. And the Board's inconsistent treatment of § 3.304(f)(3) is arbitrary and capricious.

The decision of the Board should be reversed, and Mr. Foreman and similarly situated veterans should be awarded effective dates consistent with 38 U.S.C. § 5110(a)—in most cases, the date on which the veteran's claim was first filed.

ARGUMENT

I. POSTTRAUMATIC STRESS DISORDER (PTSD) IN VETERANS

Once known by such euphemisms as "combat fatigue" and "shell shock," posttraumatic stress disorder (PTSD) is a common and devastating disorder affecting hundreds of thousands of veterans. The VA estimates that approximately 30% of all Vietnam veterans have experienced PTSD. Dep't. of Vet. Affairs, National Center for PTSD, *How Common Is PTSD*, *available at* https://www.ptsd.va.gov/public/PTSD-overview/basics/how-common-is-ptsd.asp. In addition, approximately 12% of Gulf War

veterans, and 11-20% of Operations Iraqi Freedom and Enduring Freedom veterans are diagnosed with PTSD. *Id.*

Unfortunately, due to both historical stigmatism and evidentiary challenges, the VA has long struggled (and often failed) to adequately address veterans' PTSD disabilities. Indeed, the VA did not formally recognize PTSD as a compensable disability until 1980. *See* 45 Fed. Reg. 26,326 (1980). Since then, the VA has faced an ever-increasing volume of PTSD claims.

Until recently, the VA required that a veteran's testimony regarding the in-service stressor component of a service-connected disability compensation claim be corroborated with additional evidence, such as service records or witness testimony. *See Zarycki v. Brown*, 6 Vet. App. 91, 97 (1993) ("In adjudicating a claim for service connection for PTSD, the RO is required to evaluate the supporting evidence in light of the places, types, and circumstances of service, as evidenced by service records, the official history of each organization in which the veteran served, the veteran's military records, and all pertinent medical and lay evidence."). *See also (Title Redacted by Agency)*, Bd. Vet. App. 9821536, *2-3 (July 16, 1998) (Tab A) (describing how the veteran must prove both the occurrence of an in-service stressor and the stressor's ability to cause PTSD); *(Title Redacted by Agency)*, Bd. Vet. App. 0607082, *4 (Mar. 10, 2006) (Tab B) ("[T]he record must contain service records or other credible evidence, which corroborates the stressor"). Because obtaining such evidence is frequently difficult and often impossible, the VA's requirement resulted in the denial of benefits to many veterans suffering from PTSD. *See, e.g.*, *(Title Redacted by Agency)*, Bd. Vet. App. 9207950, *2 (1992) (Tab C)

(denying connection where veteran was unable to provide sufficient factual information, such as the names of individuals he allegedly saw killed or wounded in Vietnam, that would allow his testimony to be verified); *(Title Redacted by Agency)*, Bd. Vet. App. 9216746, *1 (1992) (Tab D) (denying connection where veteran did not provide "specific information in regard to dates, places, names, and units of assignments that were the basis for the veteran's nightmares and flashbacks"); *(Title Redacted by Agency)*, Bd. Vet. App. 0607082, *9 (Mar. 10, 2006) (Tab B) (denying connection where unit records obtained from the time of the veteran's service did not corroborate his testimony regarding the non-combat in-service stressors); *(Title Redacted by Agency)*, Bd. Vet. App. 9624979, *4 (Sept. 4, 1996) (Tab E) (same); *(Title Redacted by Agency)*, Bd. Vet. App. 9905665 (Feb. 26, 1999) (Tab F) (same).

To assist these veterans, as well as to lower its own burden to search existing records for corroborating evidence, the VA over time promulgated regulations that eased the evidentiary burden for certain classes of veterans: veterans who had been diagnosed with PTSD while still in service (38 C.F.R. § 3.304(f)(1)), veterans who had been engaged in combat (§ 3.304(f)(2)), veterans who had been prisoners of war (§ 3.304(f)(4)), and veterans who were victims of personal assaults (§ 3.304(f)(5)). These regulations established that the designated classes of veterans were not required to submit corroborating evidence of their in-service stressors, provided that their own testimony was credible.

In July 2010, the VA promulgated the regulation at issue here:

> If a stressor claimed by a veteran is related to the veteran's fear of hostile military or terrorist activity and a VA psychiatrist or psychologist, or a psychiatrist or psychologist with whom VA has contracted, confirms that the claimed stressor is adequate to support a diagnosis of posttraumatic stress disorder and that the veteran's symptoms are related to the claimed stressor, in the absence of clear and convincing evidence to the contrary, and provided the claimed stressor is consistent with the places, types, and circumstances of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor. For purposes of this paragraph, "fear of hostile military or terrorist activity" means that a veteran experienced, witnessed, or was confronted with an event or circumstance that involved actual or threatened death or serious injury, or a threat to the physical integrity of the veteran or others, such as from an actual or potential improvised explosive device; vehicle-imbedded explosive device; incoming artillery, rocket, or mortar fire; grenade; small arms fire, including suspected sniper fire; or attack upon friendly military aircraft, and the veteran's response to the event or circumstance involved a psychological or psycho-physiological state of fear, helplessness, or horror.

38 C.F.R. § 3.304(f)(3). At the time, the VA stated that Section 3.304(f)(3), which "eliminates the requirement for corroborating that the claimed in-service stressor occurred," was passed in acknowledgement of "the inherently stressful nature of the places, types, and circumstances of service in which fear of hostile military or terrorist activities is ongoing." Stressor Determinations for Posttraumatic Stress Disorder, Final Rule, 75 Fed. Reg. 39843-01, 39851 (July 13, 2010). This liberalized evidentiary standard was necessitated in part by modern military conflict, which is characterized by "constant vigilance against unexpected attack, the absence of a defined front line, the difficulty of distinguishing enemy combatants from civilians, the ubiquity of improvised explosive devices, caring for the badly injured or dying, duty on the graves registration service, and being responsible for the treatment of prisoners of war." *Id.* at 39845. The new standard was intended to make the processing of PTSD claims easier and faster—not

just for the veterans but for the VA itself, by eliminating the VA's need to search for records corroborating the veteran's testimony regarding an in-service stressor. *Id.*

II. THE BOARD'S TREATMENT OF § 3.304(f)(3) AS A "LIBERALIZING LAW" IS CONTRARY TO PRECEDENT AND SOUND POLICY

The Federal Circuit squarely addressed whether a new statute or regulation constitutes a "liberalizing law" in *Spencer v. Brown*. 17 F.3d 368 (Fed. Cir. 1994). The veteran in that case argued that Congress' overhaul of the benefits determination system through the Veterans' Judicial Review Act of 1988 (VJRA) constituted a "liberalizing law" that permitted the veteran to obtain *de novo* review of an issue decided by this Court. *Id.* at 371. The veteran relied on 38 U.S.C. § 5110(g), which provided *de novo* review "where an intervening change in law or regulation has created a new basis of entitlement to a benefit." *Id.* (quoting *Spencer v. Brown*, 4 Vet. App. 283, 287 (1993)).

In rejecting the veteran's argument, the Federal Circuit held that the VJRA was not a liberalizing law that triggered § 5110(g): "Although the changes occasioned by the enactment of the VJRA were indeed significant, *such changes were unmistakably procedural in nature*." 17 F.3d at 373 (emphasis added). The changes "were directed to improving the adjudicative process and did not create new substantive rights to veterans' benefits." *Id.* The Federal Circuit thus distinguished between procedural changes, which simply improve veterans' access to benefits to which they are already entitled, and "liberalizing laws," which create "new substantive rights" and trigger § 5110(g). *See id.*

Here, like the VJRA, the amendment to § 3.304(f)(3) is a procedural change rather than a substantive liberalizing law. Indeed, the VA, in its comments accompanying the Final Rule, described it as a "liberalizing evidentiary standard," and expressly stated: "[t]he change in the evidentiary standard for establishing occurrence of an in-service stressor . . . is procedural in nature and *does not effect a substantive change in the law governing service connection for disabilities*." 75 Fed. Reg. 39843-01 at 39851 (emphasis added). Under Federal Circuit precedent, a procedural change cannot constitute a "liberalizing law." *Spencer*, 17 F.3d at 373.

Because § 3.304(f)(3) is not a liberalizing law, it does not trigger § 5110(g), which states that the earliest effective date under a liberalizing law is the date of the law itself. *See* 38 U.S.C. § 5110(g); 38 C.F.R. § 3.114 (same). This, of course, makes sense, as regulations like § 3.304(f)(3) do not create new entitlements to substantive benefits. Rather, regulations like § 3.304(f)(3) ease the procedural burden on both veterans and the VA to establish existing entitlements. The Board's treatment of § 3.304(f)(3) is thus contrary both to Federal Circuit precedent and sound policy.

Here, the Board's factual findings demonstrate that the effective date from which benefits for PTSD must be awarded is September 2008, when Appellant first filed his claim, because at that time he was already entitled to the benefits. Appellant's screenings in PTSD in 2005 and 2006—prior to the filing date of his claim—established that he suffered from PTSD. RBA 4 (RBA 2-8); RBA 980, 983, 984, 985 (RBA 972-92). He filed his claim for benefits in September 2008. RBA 3 (RBA 2-8). A VA examiner in September 2010 failed to diagnose PTSD—a finding that the Board rejected as

"erroneous[]." RBA 4 (RBA 2-8). Thereafter, another VA examiner confirmed the 2005 and 2006 diagnoses on March 22, 2011—a finding the Board accepted. RBA 5 (RBA 2-8); RBA 568-69 (RBA 568-72). The sum of the evidence demonstrates that Appellant suffered from PTSD at least as early as 2005—and according to the record, likely much earlier (RBA 52)—and thus was entitled to benefits at least as of the date of the filing of his claim. *See* 38 U.S.C. § 5110(a).

III. THE BOARD'S INCONSISTENT TREATMENT OF § 3.304(f)(3) AS A "LIBERALIZING LAW" IS ARBITRARY AND CAPRICIOUS

Consistent with the argument above, the Board of Veterans Appeals has repeatedly held that § 3.304(f)(3) is ***not*** a liberalizing law, albeit in unpublished decisions. *See, e.g.*, *(Title Redacted by Agency)*, Bd. Vet. App. 1420573, *6 (May 7, 2014) (Tab G) ("*[T]he amendments to 38 C.F.R. § 3.304(f)(3) are not considered a liberalizing law under 38 C.F.R. § 3.114*" (emphasis added)); *(Title Redacted by Agency)*, Vet. App. 1426912, 2014 WL 3959219, *3 (Jun. 13, 2014) (Tab H) ("[A]lthough the new PTSD regulation liberalizes, in particular circumstances, the evidentiary standard for establishing an in-service stressor, *it is not a liberalizing change for effective date purposes*." (emphasis added)); *(Title Redacted by Agency)*, Vet. App. 1616879, 2016 WL 3161380, *4 (Apr. 27, 2016) (Tab I) (citing 38 U.S.C. § 5110(a)) (same—granting effective date of October 8, 2009). *See also (Title Redacted by Agency)*, Bd. Vet. App. 1629772, 2016 WL 4654941 (July 26, 2016) (Tab J) (effective date was the date that the veteran was diagnosed with PTSD, which was earlier than the date of 3.304(f)(3)); *(Title*

Redacted by Agency), Bd. Vet. App. 1409255 (Mar. 5, 2014) (Tab K) (awarding effective date of June 2, 2005—the date of the veteran's initial claim). The Board's inconsistent treatment of § 3.304(f)(3) as a "liberalizing law" in this case is thus arbitrary and capricious.

CONCLUSION

For the foregoing reasons, the Consortium requests that this Court hold that 38 C.F.R. § 3.304(f)(3) is not a "liberalizing law," that claims granted pursuant to the relaxed evidentiary standard of § 3.304(f)(3) be awarded effective dates consistent with 38 U.S.C. § 5110(a), and, accordingly, that Mr. Foreman be awarded an effective date of September 23, 2008—the date he first filed his claim.

Dated: May 5, 2017

Respectfully submitted,

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Bd. Vet. App. 9821536, 1998 WL 35197373

Board of Veterans Appeals

Department of Veterans' Affairs

[TITLE REDACTED BY AGENCY]

96-23 475
Decision Date: 07/16/98
Archive Date: 07/23/98

***1** On appeal from the Department of Veterans Affairs Regional Office in New Orleans, Louisiana

THE ISSUE Entitlement to service connection for post-traumatic stress disorder (PTSD).

REPRESENTATION

Appellant represented by:Disabled American Veterans
WITNESS AT
HEARING ON APPEAL
Appellant
ATTORNEY FOR THE BOARD
Patrick J. Costello, Counsel

INTRODUCTION

The veteran had active military service from October 1966 to October 1968.

This matter came before the Board of Veterans' Appeals (hereinafter the Board) on appeal from a December 1994 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO), in New Orleans, Louisiana, the denied the veteran's claim for entitlement to service connection for PTSD.

A hearing was held in December 1997, in New Orleans, Louisiana, before Jack W. Blasingame. A transcript of the hearing was produced and has been included in the claims folder for review. However, in a letter in June 1998, the veteran was informed that due to an extended illness, Mr. Blasingame would be unable to participate in the decision. The veteran was given an opportunity for another hearing but he requested that the Board proceed on the evidence of record and that he did not want an additional hearing.

REMAND

Under the provisions of 38 U.S.C.A. § 5107(a) (West 1991 & Supp. 1997), a person who submits a claim to the VA has the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well-grounded. A well-grounded claim is one that is plausible; that is, it is meritorious on its own or capable of substantiation. King v. Brown, 5 Vet. App. 19 (1993). If the person meets this burden, the VA is obligated to assist in developing the facts pertinent to the claim. Murphy v. Derwinski, 1 Vet. App. 78 (1990); Zarycki v. Brown, 6 Vet. App. 91 (1993).

Here the medical record contains a diagnosis of PTSD, and because of this diagnosis, the Board finds that the veteran's claim is plausible, thus well-grounded. Accordingly, the VA is obligated to assist in the development of the claim.

A review of the service medical records contains no reference to any type of psychiatric condition, diagnosis, or symptomatology thereof. Post-service medical records show diagnoses of PTSD. Stressors were not confirmed by the RO. The veteran has merely claimed participation in stressful activities, but review of the record indicates that his DD Form 214, Report of Transfer or Discharge, contains no reference to any combat citations or medals. The Board notes that the Court held in West v. Brown, 7 Vet. App. 70 (1994), in effect, that a psychiatric evaluation based upon an incomplete or questionable history is inadequate for rating purposes and frustrates the efforts of judicial review.

In the case of Zarycki v. Brown, 6 Vet. App. 91 (1993), the Court set forth the framework for establishing the presence of a recognizable stressor, which is an essential prerequisite to support the diagnosis of PTSD. The Court analysis consists of two major components:

***2** The first component involves the evidence required to demonstrate the existence of an alleged stressful event; and

The second involves a determination as to whether the stressful event is of the quality required to support the diagnosis of PTSD.

With regard to the first component, under 38 U.S.C.A. § 1154(b) (West 1991 & Supp. 1997), 38 C.F.R. § 3.304 (1997), and the applicable VA Manual 21-1 [Department of Veterans Affairs Adjudication Procedure Manual, M21-1, paragraph 50.45(e), and Woods v. Derwinski, 1 Vet. App. 406 (1991)] provisions, the evidence necessary to establish the occurrence of the recognizable stressor during service to support a claim of entitlement to service connection for PTSD will vary depending on whether or not the veteran was '. . . engaged in combat with the enemy.' Hayes v. Brown, 5 Vet. App. 60 (1993).

The Court, in Hayes, articulated a two-step process of determining whether a veteran has 'engaged in combat with the enemy.' First, it must be determined, through recognized military citations or other supported evidence, that the veteran was engaged in combat with the enemy, and that the claimed stressors are related to said combat. If the determination, with respect to this type, is affirmative, then (and only then) the second step requires that the veteran's lay testimony, regarding the claimed stressors, must be accepted as conclusive after the actual occurrence. Moreover, no further development or corroborative evidence will be required provided that the veteran's testimony is found to be credible and '. . .consistent with the circumstances, conditions, or hardships of such service.' Zarycki, at 98. In other words, the claimant's assertions that he fought against an enemy are not sufficient, by themselves, to establish this fact. The record must first contain recognized military citations or other supportive evidence to establish that he '. . . engaged in combat with the enemy.' The Board further notes that the Court has indicated that the mere presence in a combat situation is not sufficient to show that an individual was engaged in combat with the enemy. Wood v. Derwinski, 1 Vet. App. 190 (1991) affirmed on reconsideration, 1 Vet. App. 406 (1991).

In West, the Court elaborated on its analysis in Zarycki. In Zarycki, the Court held that in addition to demonstrating the existence of a stressor, the facts must also establish that the alleged stressful event was sufficient to give rise to PTSD. Zarycki, at 98-99. In West, the Court held that the sufficiency of the stressor is a medical determination, and therefore adjudicators may not render a determination on this point in the absence of independent medical evidence. The Court also held in West that a psychiatric examination for the purpose of establishing the existence of PTSD was inadequate for rating purposes because the examiners relied, in part, on events whose existence the Board had rejected.

Upon reviewing Zarycki and West, it appears that in approaching a claim for service connection for PTSD, the question of the existence of an event claimed as a recognizable stressor must be resolved by adjudicatory personnel. If the

adjudicators conclude that the record establishes the existence of such a stressor or stressors, then and only then, the case should be referred for a medical examination to determine:

***3** (1) the sufficiency of the stressor;

(2) whether the remaining elements required to support the diagnosis of PTSD have been met; and

(3) whether there is a link between a currently diagnosed PTSD and a recognized stressor or stressors in service.

38 C.F.R. § 3.304(f) (1997).

In such a referral, the adjudicators should specify to the examiner(s) precisely what stressor or stressors have been accepted as established by the record, and the medical examiners must be instructed that only those events may be considered in determining whether the appellant was exposed to a stressor and what the nature of the stressor or stressors was to which the appellant was exposed. In other words, if the adjudicators determine that the existence of an alleged stressor or stressors in service is not established by the record, a medical examination to determine whether PTSD due to service is present would be pointless. Likewise, if the examiner(s) render(s) a diagnosis of PTSD that is not clearly based upon stressors in service whose existence the adjudicators have accepted, the examination would be inadequate for rating purposes.

Additionally, during the course of this appeal, the laws and regulations governing the evaluation of mental disorders have been changed. The effective date of said change was November 7, 1996. See 38 C.F.R. §§ 4.125, 4.126, 4.130, as amended by 61 Fed. Reg., No. 196, 52695-52702 (October 8, 1996). In particular, 38 C.F.R. § 4.125(a) now provides that:

If the diagnosis of a mental disorder does not conform to DSM-IV or is not supported by the findings on the examination report, the rating agency shall return the report to the examiner to substantiate the diagnosis.

Inasmuch as the appellant has not undergone a comprehensive psychiatric examination in accordance with these changes, the Board believes that he should be re-examined to ascertain the nature and severity of any psychiatric condition from which he may now be suffering. Moreover, since the RO has not adjudicated the appellant's claim under the new laws and regulations, and in order to ensure that the appellant receives his due process rights, the case is

REMAND

D to the RO for the following actions:

1. The RO should request that the veteran provide another comprehensive statement containing as much detail as possible regarding the stressor(s) to which he alleges he was exposed to while in service. The veteran should be asked to provide specific details of the claimed stressful elements during service, such as dates, places, detailed descriptions of events, and any other identifying information concerning any other individuals involved in the events, including their names, ranks, units of assignment, or any other identifying detail. The veteran is advised that this information is vitally necessary to obtain supportive evidence on the stressful events and he must be asked to be as specific as possible. He should be informed that, without such details, an adequate search for verifying information cannot be conducted. He should be further advised that a failure to respond may result in an adverse action against his claim.

***4** 2. Thereafter, the RO should contact the Director, National Archives and Records Administration (NARA), ATTN: NCPNA-O, 9700 Page Boulevard, St. Louis, Missouri 63132, and request copies of the morning reports for the veteran's unit pertinent to the events identified in the statement of the appellant. The RO should also attempt to obtain the operational reports, lessons learned statements, or any other information regarding activities of the veteran's unit

during the time frame cited that would shed light on the events related by the appellant. When this information has been obtained, it, together with the stressor information that has been provided/obtained from the veteran, should be forwarded to the United States Armed Services Center for Research of Unit Records (USACRUR), 7798 Cissna Road, Springfield, Virginia 22150, for verification of the incident or incidents which the veteran reports he re-experiences. Any information obtained is to be associated with the claims folder.

3. Following the above, the RO must make a specific determination, based upon the complete record, with respect to whether the appellant was exposed to a stressor or stressors in service, and, if so, the nature of the specific stressor or stressors. In making this determination, the attention of the RO is directed to the cases of Zarycki and West, and the discussion above. In any event, the RO must specifically render a finding as to whether the appellant '. . . engaged in combat with the enemy.' If the RO determines that the record establishes the existence of a stressor or stressors, the RO must specify what stressor or stressors in service it has determined are established by the record. In reaching this determination, the RO should address any credibility questions raised by the record.

4. If, and only if, the RO determines that the record establishes the existence of a stressor or stressors, then the RO should arrange for the veteran to be examined by a Board of two psychiatrists who have not previously examined him to determine the nature and severity of his psychiatric disorder. The RO must specify, for the examiners, the stressor or stressors that the RO has determined are established by the record. The examiners must be instructed that only those events may be considered for the purpose of determining whether the appellant was exposed to a stressor in service. Each psychiatrist should conduct a separate examination with consideration of the criteria for PTSD. The examination should be conducted in accordance with the VA Physicians Guide for Disability Evaluation Examinations. If the examiners determine that the veteran has any psychiatric disorder in addition to PTSD, the examiners should determine the relationship of any such disorders among themselves (including etiological origin and secondary causation) and specify which symptoms are associated with each disorder. If certain symptomatology cannot be disassociated from one disorder or the other, it should be so specified.

***5** If a diagnosis of PTSD is appropriate, the examiners should specify whether each alleged stressor found to be established for the record by the RO was sufficient to produce PTSD; whether the remaining diagnostic criteria to support the diagnosis of PTSD have been satisfied; and, whether there is a link between the current symptomatology and one or more of the inservice stressors found to be established for the record by the RO and found to be sufficient to produce PTSD by the examiners.

If there are different psychiatric disorder(s) than PTSD, the examiners should reconcile the diagnoses and should specify which symptoms are associated with each of the disorder(s). If certain symptomatology cannot be disassociated from one disorder or another, it should so be specified.

The report of the examination should include a complete rationale for all opinions expressed. All necessary studies or tests including psychological testing and evaluation such as the Minnesota Multiphasic Personality Inventory; the PTSD Rating Scale, the Mississippi Scale for Combat-Related PTSD are to be accomplished. The diagnosis should be in accordance with Zarycki. The entire claims folder and a copy of this Remand must be made available to and reviewed by the examiners prior to the examination.

5. The RO should then review the record and ensure that all of the above actions are completed. When it is satisfied that the record is complete and that the psychiatric examinations are adequate for rating purposes, the claim should be readjudicated by the RO.

Following completion of the requested development, the veteran's claim should be readjudicated. If the decision remains unfavorable, he and his representative should be given a supplemental statement of the case and allowed sufficient time for a response. Thereafter, the claim should be returned to the Board for further consideration.

No action is required of the veteran until he is contacted by the regional office. The purpose of this

REMAND

is to ensure due process and to obtain additional clarifying medical evidence. This claim must be afforded expeditious treatment by the RO. The law requires that all claims that are remanded by the Board of Veterans' Appeals or by the United States Court of Veterans Appeals for additional development or other appropriate action must be handled in an expeditious manner. See The Veterans' Benefits Improvements Act of 1994, Pub. L. No. 103-446, § 302, 108 Stat. 4645, 4658 (1994), 38 U.S.C.A. § 5101 (West Supp. 1997) (Historical and Statutory Notes). In addition, VBA's ADJUDICATION PROCEDURE MANUAL, M21-1, Part IV, directs the ROs to provide expeditious handling of all cases that have been remanded by the Board and the Court. See M21-1, Part IV, paras. 8.44-8.45 and 38.02-38.03.

LAWRENCE M. SULLIVAN Member, Board of Veterans' Appeals

Under 38 U.S.C.A. § 7252 (West 1991 & Supp. 1997), only a decision of the Board of Veterans' Appeals is appealable to the United States Court of Veterans Appeals. This remand is in the nature of a preliminary order and does not constitute a decision of the Board on the merits of your appeal. 38 C.F.R. § 20.1100(b) (1996).

***6** - 2 -

Bd. Vet. App. 9821536, 1998 WL 35197373

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B

Bd. Vet. App. 0607082, 2006 WL 4432978

Board of Veterans Appeals

Department of Veterans' Affairs

[TITLE REDACTED BY AGENCY]

99-19 909
Decision Date: 03/10/06
Archive Date: 03/23/06

***1** On appeal from the Department of Veterans Affairs Regional Office in No. Little Rock, Arkansas

THE ISSUE

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

REPRESENTATION

Appellant represented by:The American Legion
ATTORNEY FOR THE BOARD
C. Eckart, Counsel

INTRODUCTION

The veteran served on active duty from March 1960 to May 1964.

This case comes before the Board of Veterans' Appeals (Board) from a rating decision of April 1999 from the Regional Office (RO) of the Department of Veterans Affairs (VA), in Northern Little Rock, Arkansas, which denied the claim on appeal.

This case was before the Board previously, in December 2003, when it was remanded for further development under Disabled Veterans of America v. Secretary of Veterans Affairs (DAV v. Sec'y of VA), 327 F.3d 1339 (Fed. Cir. 2003), which invalidated the Board's ability to cure VCAA deficiencies. The case has been returned to the Board for further appellate consideration.

FINDINGS OF FACT

1. The VA has fulfilled its notice and duty to assist to the appellant by obtaining and fully developing all relevant evidence necessary for the equitable disposition of the issue on appeal.

2. The competent medical evidence of record does not show that the veteran is currently diagnosed with PTSD based upon a verified stressor from service.

CONCLUSION OF LAW

PTSD was not incurred in or aggravated by active service. 38 U.S.C.A. §§ 1110, 1131, 5103, 5103A, 5107 (West 2002 & Supp. 2005); 38 C.F.R. §§ 3.102, 3.303, 3.304(f) (2005).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

I. Duty to notify and assist

The Veterans Claims Assistance Act of 2000 (VCAA) describes VA's duty to notify and assist claimants in substantiating a claim for VA benefits. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2002 & Supp. 2005); 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.326(a) (2005).

Upon receipt of a complete or substantially complete application for benefits, VA is required to notify the claimant and his or her representative, if any, of any information, and any medical or lay evidence, that is necessary to substantiate the claim. 38 U.S.C.A. § 5103(a) (West 2002 & Supp. 2005); 38 C.F.R. § 3.159(b) (2005); Quartuccio v. Principi, 16 Vet. App. 183 (2002). Proper VCAA notice must inform the claimant of any information and evidence not of record (1) that is necessary to substantiate the claim; (2) that VA will seek to provide; (3) that the claimant is expected to provide; and (4) must ask the claimant to provide any evidence in her or his possession that pertains to the claim in accordance with 38 C.F.R. § 3.159(b)(1). VCAA notice should be provided to a claimant before the initial unfavorable agency of original jurisdiction (AOJ) decision on a claim. Pelegrini v. Principi, 18 Vet. App. 112 (2004); see also Mayfield v. Nicholson, 19 Vet. App. 103 (2005). The Board finds that any defect with respect to the VCAA notice requirement in this case was harmless error for the reasons specified below. See VAOPGCPREC 7-2004.

***2** In the present case, the veteran's claim seeking entitlement to service connection was received in October 1998. After adjudicating the veteran's claim in April 1999, initial notice of the provisions of the VCAA was provided to the veteran in a January 2004. In this letter, the veteran was told of the requirements to establish service connection, of the reasons for the denial of his claim, of his and VA's respective duties, and he was asked to provide information in his possession relevant to the claim. The duty to assist letter and the supplemental statement of the case issued in September 2005 specifically notified the veteran that VA would obtain all relevant evidence in the custody of a federal department or agency. He was advised that it was his responsibility to either send medical treatment records from his private physician regarding treatment, or to provide a properly executed release so that VA could request the records for him. The veteran was also asked to advise VA if there were any other information or evidence he considered relevant to this claim so that VA could help by getting that evidence.

VA must also make reasonable efforts to assist the claimant in obtaining evidence necessary to substantiate the claim for the benefit sought, unless no reasonable possibility exists that such assistance would aid in substantiating the claim. 38 U.S.C.A. § 5103A(a); 38 C.F.R. § 3.159(c), (d). Service medical and personnel records were previously obtained and associated with the claims folder. The veteran was sent a letter in March 1999 asking him to set forth his stressors with specificity. Furthermore, VA medical records were obtained and associated with the claims folder. The Board remanded this matter in December 2003 to obtain additional evidence in an attempt to verify the veteran's stressors. Attempts to do so by the service department were made and unit records as well as copies of the veteran's service personnel records were obtained. The veteran was also afforded the opportunity to testify at a RO hearing before a hearing officer.

Assistance shall also include providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim. 38 U.S.C.A. § 5103A(d); 38 C.F.R. § 3.159(c)(4). Based on the evidence lacking a verified stressor, an examination is not warranted in this case.

Given the foregoing, the Board finds that the purpose behind the notice requirement has been satisfied because the appellant has been afforded a meaningful opportunity to participate effectively in the processing of his claim. Mayfield, 19 Vet. App. at 123-29 (2005). For these reasons, it is not prejudicial to the appellant for the Board to proceed to finally

decide this appeal. See Conway v. Principi, 353 F.3d 1369 (Fed. Cir. 2004); Quartuccio, 16 Vet. App. at 186-87; Sutton v. Brown, 9 Vet. App. 553 (1996); Bernard v. Brown, 4 Vet. App. 384 (1993).

II. Service Connection

***3** Generally, service connection may be granted for a disability resulting from a disease or injury incurred in or aggravated by service. 38 U.S.C.A. §§ 1110, 1131 (West 2002 & Supp. 2005); 38 C.F.R. § 3.303 (2005). Service connection may also be granted on a presumptive basis for a psychosis if manifested to a compensable degree within a one year period of discharge from service. 38 U.S.C.A. §§ 1101, 1112, 1113, 1137 (West 2002 & Supp. 2005); 38 C.F.R. §§ 3.307, 3.309 (2005).

If a condition noted during service is not shown to be chronic, then generally a showing of continuity of symptomatology after service is required for service connection. 38 C.F.R. § 3.303(b). The chronicity provisions of 38 C.F.R. § 3.303(b) are applicable where evidence, regardless of its date, shows that the veteran had a chronic condition in service, or during an applicable presumption period, and still has such condition. Such evidence must be medical unless it relates to a condition as to which, under the case law of the United States Court of Appeals for Veterans Claims (Court), lay observation is competent.

Service connection connotes many factors but basically it means that the facts, shown by evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service. In order to prevail in a claim for service connection there must be medical evidence of a current disability as established by a medical diagnosis; of incurrence or aggravation of a disease or injury in service, established by lay or medical evidence; and of a nexus between the in-service injury or disease and the current disability established by medical evidence. Boyer v. West, 210 F.3d 1351, 1353 (Fed. Cir. 2000). Medical evidence is required to prove the existence of a current disability and to fulfill the nexus requirement. Lay or medical evidence, as appropriate, may be used to substantiate service incurrence.

Service connection for PTSD requires a current medical diagnosis of PTSD (presumed to include the adequacy of the PTSD symptomatology and the sufficiency of a claimed in- service stressor), credible supporting evidence that the claimed in-service stressor(s) actually occurred, and medical evidence of a causal nexus between current symptomatology and the specific claimed in-service stressor(s). See 38 C.F.R. § 3.304(f) (2005); 67 Fed. Reg. 10,330, 10,332 (Mar. 7, 2002) (codified as amended at 38 C.F.R. § 3.304(f)); see also Cohen v. Brown, 10 Vet. App. 128, 138 (1997) (citing Moreau v. Brown, 9 Vet. App. 389, 394-95 (1996)).

Specifically, to establish entitlement to service connection for PTSD, the veteran must submit '...medical evidence diagnosing the condition in accordance with § 4.125(a) of this chapter; 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) (2005). The Board notes that 38 C.F.R. § 3.304(f) was amended effective March 7, 2002; however, the changes pertain primarily to claims involving personal assaults.

***4** The evidence necessary to establish the occurrence of a stressor during service to support a claim for PTSD will vary depending on whether the veteran was 'engaged in combat with the enemy.' See Hayes v. Brown, 5 Vet. App. 60, 66 (1993). If the evidence establishes that the veteran was engaged in combat with the enemy or was a prisoner of war (POW), and the claimed stressor is related to combat or POW experiences (in the absence of clear and convincing evidence to the contrary, and provided that the claimed stressors are 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.

Where, however, VA determines that the veteran did not engage in combat with the enemy and was not a POW, or the claimed stressor is not related to combat or POW experiences, the veteran's lay statements, by themselves, will not be enough to establish the occurrence of the alleged stressor. Instead, the record must contain service records or other

credible evidence, which corroborates the stressor. 38 U.S.C.A. § 1154(b) (West 2002); 38 C.F.R. § 3.304(d), (f) (2005); Gaines v. West, 11 Vet. App. 353, 357-58 (1998). Such corroborating evidence cannot consist solely of after- the-fact medical nexus evidence. See Moreau, 9 Vet. App. at 396.

When all the evidence is assembled VA is then responsible for determining whether the evidence supports the claims or is in relative equipoise, with the appellant prevailing in either event, or whether a preponderance of the evidence is against the claims, in which case the claims must be denied. See Gilbert v. Derwinski, 1 Vet. App. 49, 55 (1990). The Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant. 38 U.S.C.A. § 5107 (West 2002).

The veteran alleges that he is entitled to service connection for PTSD. His claimed stressors were all said to take place between 1961 and 1963 while the veteran was stationed in Hawaii and include as follows. First he was auditing the property of a man in a jail cell and found the man in the cell with both arms cut after a suicide attempt. Then a friend was run over and killed in a road where he had passed out, and the veteran had to deal with the situation. Another time seven friends invited him to go into town, he declined and later six of them were killed in a car accident on the way back. He then claimed to have witnessed a civilian on a motorcycle get hit by a car and had both legs severed. Another stressor was claimed when a fellow soldier named D. H. had a mental break down on a mountain climb and the veteran helped him into a straight jacket. He also had to restrain another soldier in a straight jacket when this soldier was found butting his head against a tree and screaming for help. Another stressor was when another soldier the veteran knew accidentally shot the calf of his own leg off and the veteran saw this man's calf. Another time a soldier was accidentally shot in the head and was hospitalized and the veteran visited the man in the hospital. Another incident was when a staff sergeant killed his wife and himself with a shotgun. The veteran also stated another stressor was an incident in which a dependant's wife had a mental breakdown and ran through the housing area naked. He also claimed as stressors having to take several soldiers to jail and participating in court martials. Another stressor he claimed was having slept on a rack next to [redacted] who later shot people from a tower in Texas and that he had always felt uneasy about this individual. Finally he claimed that one time a bomb was dropped on Johnson Island at midnight and the sky lit up like the midday sun.

***5** His February 1960 entrance examination reflects a normal psychiatric examination, with no complaints of a psychiatric nature reported in the accompanying report of medical history. Service medical records reflect no evidence of PTSD. His May 1964 separation examination revealed a normal psychiatric examination.

Service personnel records reflect that the veteran served in administrative, mess hall or clerical positions from between August 1960 and May 1961. He served as a guard between May 1961 and May 1963.

Psychiatric complaints are not shown until 1997. In February 1997 he was seen for individual psychotherapy and reported having taken some days off work to recuperate and was feeling somewhat better. He discussed what was fueling his stress levels at work, and the discussion focused on problems where his work environment became emotionally unmanageable. His position was described as one that was not predictable or stable in most ways. A March 1997 psychotherapy record revealed the veteran reported significant improvement in his depressive symptoms, including increased energy, decreased appetite. He had a tendency to overeat in response to stress and depression. He had decreased awakening during the night and more satisfying hours of sleep. He also had decreased anxiety and fearful rumination. Other records from March 1997 reflect the veteran's psychiatric complaints including depressive symptoms and job related stress. He was noted to be taking Trazodone and Prozac in May 1997 and continued to suffer symptoms of anxiety and periods of fearfulness and tearfulness in an August 1997 record. None of these records gave a specific psychiatric diagnosis.

VA records from 1998 to 1999 reflect psychiatric complaints and a diagnosis of PTSD. He was referred to the mental hygiene clinic (MHC) for psychotherapy in May 1998 and a subsequent record from the same month focused on the

stressful experiences which involved his work with military prisoners, men who were mentally ill and witnessing a motor vehicle accident and not being able to save the victim. He had recurrent nightmares of the accident. He had been able to function well until July 1994 when he had a heart attack. Since then he had to retire from his post office job and has developed major depression accompanied by anxiety. He continued to be treated throughout the summer and fall of 1998 for symptoms that included flashbacks, nightmares, depression and anxiety. At the end of September 1998 he was assessed with 'probable PTSD.' In October 1998 the diagnosis was PTSD. In December 1998 he was seen in the MHC and reported feeling calmer on medication that was also said to help him shut off his flashbacks. The assessment was PTSD, major depression in partial remission. Again in January 1999, he was assessed with PTSD, and the session focused on his symptoms that included nightmares, dysphoric mood, chronic anxiety and problems with anger. In February 1999, he was seen and the session focused around three stressful incidents since his last appointment. One incident was an outbreak of violence at work, another was a motor vehicle accident and the third was watching a war movie on television. These caused an increase in nightmares, anger and anxiety. Guns being fired and being around sickness and death were triggers for him also. He had some crying spells. The assessment was PTSD, chronic and moderate and dysthymia. A record from March 1999 reflected ongoing treatment for PTSD symptoms, with complaints of chronic nightmares, some of which were service related and involved him running away from something that was crowding him and as if he were on an obstacle. Other symptoms included chronic anxiety and fears, especially around the anger, resentment or hostility around others. He also reported flashbacks and irritability. The assessment was PTSD, chronic and moderate, major depressive episodes, recurrent.

***6** He continued treatment for PTSD as shown in records from April and May 1999, with the May 1999 records noting that he worked as a prison chaplain eight hours a day and some weekends. He admitted that this job could be stressful. Another May 1999 MHC treatment plan described 'combat experiences' as his limitations and identified the goal to help the veteran sleep better and reduce his nightmares and flashbacks. In June 1999 the session focused on an aggressive incident at work which caused an exaggerated startle response and increasing anxiety and a 'bad colon attack.' The assessment was PTSD, major depression, recurrent in partial remission. In July 1999 the veteran was seen at MHC feeling more tense and nervous since his last session and triggers for his anger and anxiety were a focus of his session. Anger and aggression expressed by others had always been a trigger and on his job as a prison chaplain, he had seen an increase in the aggression during the summer months. He was also anxious about an upcoming job evaluation. In August 1999 he reported feeling increasingly anxious for the past three or four weeks. The assessment continued to be PTSD and major depression in partial remission. In September 1999 he reported an increase in feelings of 'uptightness' and anxiety, although he denied any new stressors or problems. However, after discussion, it appeared this increase was due to an increase in activity in his job as a prison chaplain, and accordingly an increase in exposure to crowds and groups of people. He continued to be assessed with PTSD and major depression. He continued to be treated through the end of 1999 for symptoms of PTSD.

The veteran testified at a RO hearing about his PTSD and claimed stressors. He testified that after basic training he entered school at Camp Pendleton in California. He testified that he was then assigned to the Marine Naval Ammunition Depot in Oahu Hawaii between May 1961 and May 1963. He testified that during this period he essentially served as a military police (MP) and was involved in taking personnel to the brig as well as to the psychiatric hospital. He testified that he had to restrain individuals who had nervous breakdowns and became violent. He would have to subdue them until they were injected with a sedative. He testified that one of the individuals he had to restrain was a friend and barracks mate who had a breakdown on a mountain climb. He also testified that several Marines asked him to go into town with them and he declined. Later on the way back they were in a motor vehicle accident that killed all but one of them. He said that six of them were killed and he had to help with the post accident investigation. He testified that another individual he knew passed out drunk on a service road and was hit and killed by a car. He was unable to remember this individual's name. He also testified that his staff sergeant shot and killed his wife and her lover and then shot himself. He was unable to recall this man's name. He also testified that another individual was accidentally shot in the head and was paralyzed. He testified that he visited this man in the hospital. He testified about another individual who accidentally shot the calf off his leg. He testified that he witnessed some of these incidents, and other instances he saw the individuals in the hospital

after the incidents took place. He testified that while he was involved in inventorying the gear for an individual being held for a disciplinary write up, the person had cut his wrists and was lying in his blood. He also testified that he saw the flash from a midnight atomic bomb testing at Johnson Island. He testified that he was stationed at Lulalai beach and they were awaiting the bomb test.

***7** VA records from 2000 reflect ongoing treatment for PTSD symptoms. In February 2000 he reported an increase in his symptoms recently following an incident in which an inmate was brutally attacked and cut on many parts of his body. He had much contact with the victim and the attacker. He began having increased nightmares. He was given an Axis I diagnosis of PTSD. Another February 2000 record related the veteran's symptoms having worsened after the attack by one inmate on another around Christmas, which resulted in the death of the second inmate. This event triggered increased nightmares, disturbed sleep, increased anxiety and increased 'colon spasms.' He began questioning whether this was the most appropriate job for him. The assessment was PTSD and major depression.

A March 2000 psychotherapy consult reflects that the veteran gave a history of having served in the military as a clerk and in security in Hawaii and his service included having witnessed several shootings and recovering bodies from shootings. He related one event out of 18 he had, in which he recovered the bodies of a sergeant, his wife and her lover. This sergeant had checked out a weapon from the veteran that was used for the murder suicide. The veteran then gave a history of having worked as a pastor for 22 years, and reported having left the ministry full time since he was too frequently in pastoral situations dealing with death. Most recently he had been working as a chaplain with the Department of Corrections where he reported having witnessed inmate stabbings and fights which were said to have caused an exacerbation of flashbacks and nightmares. The psychotherapist's reported test history, findings and interview behavior were consistent with the diagnoses of PTSD and depression. He was viewed as likely benefiting from a career change where he would find a position that would less likely involve contact with violent persons who were likely to exacerbate his PTSD symptoms.

In October 2000 the veteran reported that he was transferred to a different unit in the prison, which he felt would reduce some stressors, but would also potentially add a stressor as the unit he was moving to had a death row. He continued to have trouble coping with the aggressiveness and violence that he came in contact with at the other unit. He continued to be assessed with PTSD and chronic depressive disorder. Another October 2000 record characterized the veteran as being a 'combat vet' with chronic depression and PTSD. In December 2000 the veteran was said to be followed up for PTSD related to combat in Vietnam. He had recently changed positions and the unit he was now working in was scheduled to have an execution in two weeks. He acknowledged being increasingly depressed and anxious since he learned of the execution date and realized that it was having a very negative effect on him. He was considering finding another job. His Axis I diagnoses were PTSD and dysthymia.

PTSD symptoms continued to be addressed in records from 2001. In February 2001 he felt that his symptoms were helped by medication and his overall condition was made worse by his work environment. He was working with prisoners involved with violence and with occasional executions. The Axis I diagnosis was PTSD. In May 2001 his session was focused on the increasing work stress which was said to be increasing his PTSD symptoms. His siblings were also causing him many new stressors. In June 2001 he was seen for PTSD related to severe trauma experienced in non combat assignments while on active duty. He was currently a prison chaplain and this work greatly exacerbated his PTSD symptoms. He now frequently ministered to inmates on death row, including one this week the day he was executed. He was aware he needed to change jobs and had been planning to do so. The records from June 2001 reflect that he experienced an exacerbation of symptoms of stress and anxiety after there was an execution. His wife also reported in June 2001 that his behavior had become more bizarre and he said the stressors of the past six months have contributed to his increase in symptoms with recent deaths and illnesses of family members as well as stress from recent executions at the prison where he worked. The Axis I diagnoses in this June 2001 record were major depression; s/s PTSD. He continued treating through July and August 2001 for symptoms of major depression and PTSD, with his symptoms said to be very much affected by the violence and executions at his job. One of the incidents discussed in July 2001 was a recent murder

at the prison. He reported increased anxiety and endorsed headaches and chest pain. The assessment was PTSD. An August 2001 record assessed PTSD from many military traumas, with a history of recurrent major depression and an increase in symptoms due to work related trauma.

***8** In September 2001 he continued to endorse problems related to the stress in his job, and reported having had to deal with four deaths related to his job, including a possible suicide/murder. He also reported an additional stress of having a co-worker terminated and led off the grounds in handcuffs, thereby increasing his workload. He focused on these stressors and symptoms brought about by them, including forgetfulness, decreased energy and anhedonia. He was assessed with PTSD and major depression. Also in September 2001, he reported stressors due to illnesses from family members. In November 2001, he was noted to have had chronic anxiety and depression for years, with these problems having been greatly exacerbated by his current job stressors as well as health problems in family matters. He was also worried about possible layoffs. The impressions were that the situational stressors continued but that medications were said to help. The Axis I diagnosis was depressive disorder not otherwise specified.

He continued to receive psychiatric treatment for symptoms that included PTSD in 2002. In February 2002 he was seen for complaints of an increase in frequency of periods of agitation which he felt were triggered by the agitation of the inmates he was working with. They caused increased sleep disturbance. The assessment was PTSD and major depression, recurrent. Also in February 2002 he reported being unable to tolerate a lot of stress for prolonged periods and his prison job continued to be very stressful, with an increase in violence in the prison as well as having increased contact with the prisoners. In June 2002 he reported having had an altercation with a prison and experienced much guilt, sadness and crying since this happened. In July 2002 he also discussed family stressors stemming from a daughter's divorce as well as his ailing mother-in-law living with him and his wife causing much stress. He was assessed with PTSD and major depression. He was also said to feel very stressed by violence at work and the session's focus was on his nightmares and the long history of violence in his life beginning in the Marines.

In August 2002, the veteran was said to have increased stress levels due to a family situation. His symptoms remained consistent with PTSD and depression. In September 2002 his symptoms remained consistent with diagnoses of depression, severe, recurrent and PTSD. His test scores were in the extremely severe range for depression. In October 2002 he was seen for a psychotherapy session and reported problems with church services at prison with the stress of the inmates acting out during the service. He seemed more depressed than at the last session and his symptoms remained consistent with the diagnoses of PTSD and depression, severe. Other records from October 2002 reflect the veteran to describe family related stressors as well as work stressors. He reported changing work locations to a prison unit that lacked a death row, and this was viewed as potentially less stressful of an assignment as he would not be exposed to death row inmates and executions which were extremely difficult for him and increased his symptoms of anxiety and depression.

***9** Available unit records were submitted by the Marine Corps Personnel Management Support Branch (Branch) in November 2002 accompanied by a letter stating that the best available diaries of the Marine Barracks in Hawaii showing the injuries from May 18, 1961 to May 10, 1963 were provided. There were no reports of any apparent suicides or of any Marines killed as the result of an accident. Anecdotal incidents although they may be true were not researchable. In order to be researched the incidents must be reported and documented. The Branch had no means to verify incidents regarding civilians. Any medical records regarding the individual named Donald Hobson would be in his health records. The attached unit diaries showed a Marine injured as the result of a bullet wound, however there was no explanations how this occurred. The letter noted that there was a [redacted] [redacted] in the Headquarters Battalion, 2nd Marine Division, Camp Lejune, North Carolina the same period as the veteran.

The attached unit records reflect the following: In May 1961, an individual named [redacted] was injured by ‘accidental dis‘ in Lualulei, Oahu, Hawaii and was treated at the Tripler Army Hospital (USAH). In July 1961 an [redacted] [redacted] was wounded in an accident and received a deep laceration wound of the left upper thigh. In August 1961 a [redacted] was injured in an accident at the Waikele Hobby Shop. In August 1962 an [redacted] was injured and treated

at the Tripler USAH. In September 1962 a [redacted] was injured in an automobile accident in Oahu and treated at the Tripler USAH. A November 1962 record indicated that [redacted] [redacted] had chargable to 'sk 0930' on November 6, 1962 as a result of injured automobile accident. A November 1962 reflects that a [redacted] was injured in an automobile accident and was treated at Tripler USAH. A February 1963 record reflects that an [redacted] was injured by a bullet wound in Nanakuli and was sent to 'sk 0300 Tripler USAH.' The records also include a personnel roster from December 1963 showing a [redacted] was included in the roster.

A February 2004 letter from the Marine Corps Historical Center stated that there were no records on file from the Naval Ammunition Depot in Oahu or for the Headquarters Battalion for the Second Marine Division for any of the periods requested. They had no information on whether the records prepared or what became of them if they were prepared.

In August 2004 the veteran submitted photographs of several individuals who served with him and played football with him. Names of these individuals were handwritten on the back. Of these individuals, only the name '[redacted]' appears to match the name of the individuals listed in the unit records. This individual appears to have been injured in a motor vehicle accident according to the unit records. The veteran wrote on the photograph a statement saying this individual was killed.

Based on a review of the evidence, the Board finds that the preponderance of the evidence is against a grant of entitlement to service connection for PTSD. The veteran does not allege, nor does the evidence show that the veteran experienced combat. His basis for PTSD is said to be due to numerous non combat related stressors, detailed above. The evidence obtained does not verify these claimed stressors. Although unit records obtained from the time the veteran was stationed in Hawaii between May 18, 1961 to May 10, 1963 include reports of motor vehicle accidents and gunshot wound incidents similar to those cited by the veteran, they do not place the veteran at the site of such incidents, do not reflect that he knew the individuals involved, with the possible exception of [redacted], nor do they show that some of the incidents resulted in deaths as claimed by the veteran. Specifically the motor vehicle accidents were said by the veteran to have caused fatalities, including the death of [redacted]. However the unit records only show that injuries resulted from these accidents. Likewise although the unit records reflect that a [redacted] was in the Headquarters Battalion, 2nd Marine Division, Camp Lejune, North Carolina the same period as the veteran, there is no evidence that the veteran had any contact with him. Other incidents cited by the veteran such as the motorcycle accident, the fellow soldier being hit and killed by a car, the sergeant's murder suicide and the atomic bomb testing are not shown in the unit records or elsewhere other than in the veteran's own statements. Regarding the veteran's claims that he was forced to subdue and restrain violent individuals and persons having nervous breakdowns, his military occupational specialty is noted to include service as a guard. However there are no incident reports of record to confirm his claimed stressors resulting from his duties as a guard or as a clerk while in service.

***10** In summary, the Board finds that the veteran's claimed service related stressors have not been verified, with the only evidence suggesting exposure to such stressors coming from the veteran himself. The Board notes that the VA records are shown to mention a large number of post-service stressors that appear to be affecting his current psychiatric condition, including a highly stressful position working in a prison, which involves exposure to death and violence on a regular basis.

In the absence of confirmation of a stressful incident, which supports a diagnosis of PTSD, the diagnoses of PTSD contained in the record is not supported by a verified stressor. See Wilson v. Derwinski, 2 Vet. App. 614, 618 (1992), 'Just because a physician or other health care professional accepted the veteran's description of his Vietnam experiences as credible and diagnosed the appellant as suffering from PTSD does not mean that the BVA was required to grant service connection for PTSD.' Wilson v. Derwinski, 2 Vet. App. 614, 618 (1992). '

In conclusion, as there is no probative supporting evidence that a claimed stressor actually occurred, the Board finds that the preponderance of the evidence is against the veteran's claim of entitlement to service connection for PTSD. While the veteran may well believe that his PTSD is related to service, as a layperson without medical expertise, he is

not qualified to address questions requiring medical training for resolution, such as a diagnosis or medical opinion as to etiology. See Espiritu v. Derwinski, 2 Vet. App. 492, 494-95 (1992). Therefore, the veteran's claim of entitlement to service connection for PTSD must be denied.

In denying the veteran's claim, the Board also has considered the doctrine of reasonable doubt; however, as the preponderance of the evidence is against the veteran's claim, the doctrine is not for application. See Gilbert v. Derwinski, 1 Vet. App. 49, 54 (1990).

ORDER

Service connection for PTSD is denied.

_____ A. BRYANT Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

Bd. Vet. App. 0607082, 2006 WL 4432978

C

Bd. Vet. App. 9207950, 1992 WL 12112900

Board of Veterans Appeals

Department of Veterans' Affairs

[TITLE REDACTED BY AGENCY]

***1** Y92 BOARD OF VETERANS' APPEALS WASHINGTON, D.C. 20420

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THE ISSUE
Entitlement to service connection for post-traumatic stress disorder.

REPRESENTATION
Appellant represented by: Division of Veterans Affairs, New York
ATTORNEY FOR THE BOARD: Raymond F. Ferner, Counsel

INTRODUCTION

This matter comes before the Board of Veterans' Appeals (BVA or Board) on appeal from decisions of the Department of Veterans Affairs (VA) Regional Office in New York, New York (RO). The veteran had active service from September 1965 to August 1967.

A March 1987 rating decision denied entitlement to service connection for post-traumatic stress disorder (PTSD). A notice of disagreement was received in March 1987, and a statement of the case was issued in July 1987. Supplemental statements of the case were issued in December 1987 and April 1988. A VA Form 1-9 (Appeal to Board of Veterans' Appeals) was received in May 1988 with a request for a hearing. A hearing was held in September 1988. A supplemental statement of the case was issued in February 1989. The RO certified the issue on appeal and the case was received at the VA in April 1989.

By a decision dated in June 1989, the BVA remanded this case for further development. Following that development, the RO issued a supplemental statement of the case in December 1989. The RO recertified the issue on appeal in January 1990, and the case was again received at the BVA in April 1990. In July 1990, on the Board's own initiative, the case was referred to the VA Chief Medical Director for review and an opinion which was obtained in October 1991. The veteran has been represented by the New York Division of Veterans Affairs throughout his appeal. The case is now ready for appellate review.

CONTENTIONS OF APPELLANT ON APPEAL

The veteran essentially contends that the RO was incorrect in not granting service connection for PTSD. He maintains, in substance, that he has PTSD resulting from his service in Vietnam. He relates that while in Vietnam, he was exposed to stressful incidents, including guard and patrol duty, as well as enemy small arms fire. He relates incidents in which he witnessed the rape of a Vietnamese woman by comrades and another incident in which he and others on guard duty fired on and killed individua ls attempting to cross a bridge, and later discovered that they were young children, maybe

13 or 14 years old. It is pointed out that the veteran has been diagnosed as having PTSD by the VA and that he receives treatment for that disorder. Therefore, he feels he is entitled to service connection for PTSD.

DECISION OF THE BOARD

For the reasons and bases to be explained, it is the decision of the Board that the evidence is against the claim for service connection for PTSD.

FINDINGS OF FACT

1. All relevant evidence necessary for an equitable disposition of the veteran's appeal has been obtained by the RO.

***2** 2. The veteran is not shown to have been exposed to a recognizable stressor in service to support the diagnosis of PTSD.

CONCLUSION OF LAW

Post-traumatic stress disorder was not incurred in or aggravated by active service. 38 U.S.C. §§ 1110, 5107 (1989) (formerly §§ 310, 3007, recodified in 1991).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

As a preliminary matter, we find that the veteran's claim is 'well grounded' within the meaning of 38 U.S.C. § 5107(a) (1989). That is, we find that he has presented a claim which is not implausible when his contentions and the evidence of record are viewed in the light most favorable to that claim. We are also satisfied that all relevant facts have been properly developed.

The Board's review of the record discloses that the veteran served in Vietnam from October 1966 to September 1967. His military occupational specialty was that of a crane shovel operator with the 56th CS CO Hvy. Sup. (56th Supply Company, Composite Service, Heavy Material Supply; C. S. Stanton, Vietnam Order of Battle, Ch. 18, pg. 201 (1981)). Pertinent awards and decorations received by the veteran include the Vietnam Service Medal and the Vietnam Campaign Medal. We note at this point that neither the veteran's military occupational specialty, nor his service records provide evidence that he was exposed to more than an 'ordinary stressful environment, even given the fact that service in a combat zone is stressful in some degree to all who are there, whatever their duties and experiences.' Wood v. Derwinski, U.S. Vet. App. No. 89-50, slip op. at 4 (March 28, 1991). Despite the suggestion that the 'CS' in the veteran's unit designation stands for 'Combat Support,' which it clearly does not, the veteran's personnel records demonstrate that he was assigned to an occupation and unit generally not associated or involved in combat.

Since the veteran has been diagnosed as having PTSD, the ultimate question is whether the stressors related by the veteran provide an adequate basis to support a diagnosis of PTSD. However, 'the BVA [is] not bound to accept [the veteran's] uncorroborated account of his Vietnam experiences...' Wood, slip op. at 4, nor we would add, are we bound to accept a diagnosis of PTSD that is based on an uncorroborated account of the veteran's Vietnam experiences or accept an account which is inconsistent with his service records.

As for the veteran's account of his Vietnam experiences, we observe that the veteran has been unable to provide specific factual information, such as the names of individuals killed and wounded in Vietnam or the names of those involved in the specific incidents related by him, which would allow for verification or confirmation from the United States Army and Joint Services Environmental Support Group. While there is some indication that the veteran has a poor memory, he has related some selective information and incidents regarding his service in Vietnam, but '[t]he factual data required,

i.e., names, dates, and places, are straightforward facts, and do not place an impossible or onerous task on appellant.' Wood, slip op. at 5.

***3** In any event, with respect to the specific information provided by the veteran, he related during his October 1986 VA examination that he served in combat and that he was assigned as a sniper. However, his service records do not show combat service or specialized training as a sniper. He also related during the 1986 examination that he witnessed American soldiers rape a Vietnamese girl and then stab her in the left chest, but at his hearing, he testified that 'They raped her and slapped her.' (Transcript at 7.) He also indicated that those involved were American soldiers who were known to him, some from his own unit, but he was not otherwise more specific. Following the 1986 examination, it was apparent that the diagnosis of PTSD was based on the veteran's 'active combat' in Vietnam.

The veteran also related during the VA examinations performed in February and December 1988 that he was a sniper in Vietnam, but later testified that he spent his entire time in Vietnam on guard duty and on patrols, and that he did not serve in his military occupational specialty while in Vietnam, despite the contrary indication from his service records. He testified further that he did not work in the construction field as a crane operator while in Germany, as shown by his service records. This testimony essentially amounts to the veteran never having worked in his military occupational specialty while on active duty following his training in that career field.

It does appear from the record that the diagnosis of PTSD, including that related by the October 1991 opinion from the VA Chief Medical Director, are based on either the veteran's claimed participation in combat as a sniper or on continuous guard and patrol duty while in Vietnam, and/or on unverified and uncorroborated incidents which have not been consistently related by the veteran. As previously mentioned, for example, the veteran related that the Vietnamese girl that was raped by American soldiers was stabbed, but later testified that she was only slapped. Such a significant change in the factual nature of the event undermines the veteran's credibility and the probative value of his statements and testimony regarding that incident. Recent testimony that he never worked in the military occupational specialty he was trained in while stationed in Germany or Vietnam, and that he served on continuous guard and patrol duty while in Vietnam further strains his credibility. In addition, the veteran testified that while on patrol, he saw comrades killed and wounded, transcript at 5, but could not provide the names of those soldiers so as to permit verification of his account.

The veteran has also related an incident regarding two boys killed while attempting to cross a bridge the veteran was guarding in Vietnam. This incident, as well as the rape of a Vietnamese girl, cannot be objectively verified, as noted by our dissenting colleague, but we observe that the incident has undergone some embellishment. During the October 1986 examination the veteran simply related that 'The enemy tried to cross the bridge and had to be shot down.' By the time of the September 1988 hearing, the incident had become a fire fight with shelling. Transcript at 3.

***4** Since evidence of a combat stressor has not been objectively verified or confirmed, what is left are two incidents claimed as stressors which are not capable of verification. In this situation an analysis of the credibility and probative value of the evidence becomes critical. We are of the opinion that the inconsistencies with the objective evidence, specifically the veteran's service records regarding his duties in Vietnam, as well as the fluid nature of the incidents related by the veteran, and the inability to recall specific objectively verifiable information of the individuals involved in the incidents related and those killed while on patrol, significantly diminishes both the veteran's credibility and the probative value of his statements and testimony when compared with the objective evidence. In this regard, we find that the veteran's service personnel records have greater probative value.

With respect to the lay statements and sworn testimony of others, the probative value of that evidence is not great and almost nil, as none were present in Vietnam and are only relating what has been told to them by the veteran or their observations of the veteran's symptomatology, which is not at issue. That the veteran may manifest symptomatology, which is compatible with PTSD is essentially irrelevant if the veteran is not shown to have been exposed to a stressor to support such a diagnosis.

We, therefore, find by a fair preponderance of the evidence that the veteran's exposure to a recognizable stressor which would evoke symptoms of distress in almost anyone has not been convincingly or persuasively demonstrated. As a result, a diagnosis of PTSD is not considered reliable. Accordingly, we conclude that service connection for PTSD is not established.

ORDER

Service connection for PTSD is denied.

BOARD OF VETERANS' APPEALS WASHINGTON, D.C. 20420

WARREN W. RICE, JR., DISSENTING C.W. HUMPHREYS, JR., M.D.

FRANCIS F. TALBOT

DISSENT

I must respectfully dissent from the decision of my colleagues that the veteran does not have a post-traumatic stress disorder resulting from his service in Vietnam. They base their conclusions on the premise that an adequate stressor is not verified by the evidence of record to support a diagnosis of post-traumatic stress disorder. I submit that there are innumerable stressful incidents that occurred to servicemen during our involvement in the Vietnam war that are incapable of verification. I believe the events described by the veteran fall into that category. It is highly unlikely that either the rape of a Vietnamese girl by American soldiers or the killing of young Vietnamese boys on a bridge at night during the veteran's guard duty in a combat area would be capable of verification, yet how can reasonable men conclude that these events indelibly impressed in the veteran's memory did not happen and that they did not trigger the development of his chronic psychiatric disorder? Certainly, there are countless undocumented and unverifiable Vietnam war horror stories based on factual experiences which forever will be known and remembered only by those who witnessed them. In contrast with the speculation of my colleagues that the veteran did not experience the atrocities he describes, let us look at the evidence which is of record and which the Board must consider.

***5** The veteran and others have supplied sworn testimony in support of his claim at a personal hearing in the regional office in September 1988. Also, lay statements have been submitted substantiating the veteran's claim. Reports from VA psychiatrists dated from 1988 to 1989 show the veteran was being treated for a primary diagnosis of chronic post-traumatic stress disorder with psychotic features. A board of three VA psychiatrists reported on examination in December 1988 that it was their overall impression the veteran was severely disabled psychiatrically and that the clinical data warranted diagnoses of both schizophrenia and post-traumatic stress disorder. It was stated that the veteran had persistently reexperienced traumatic events in Vietnam. A VA psychiatrist reported a primary diagnosis of chronic post-traumatic stress disorder with psychotic features in a letter dated April 7, 1989, wherein he described the veteran's recent difficulties.

In response to questions from the Board, the Director of the Department of Veterans Affairs Mental Health and Behavioral Sciences Service, the designated representative of this Department's Chief Medical Director and Chief Medical Officer of the VA offered the following opinion dated October 3, 1991:

‘The records of [the veteran] were reviewed and the following opinions are offered to your questions.

‘a. Are the recent diagnoses of post-traumatic stress disorder supported by the record and, if not, does the veteran have any other acquired psychiatric disorder traceable to service?

‘ANSWER: Yes, the diagnosis of post-traumatic stress disorder (PTSD) is supported by the record.

‘b. Is any further testing desirable to aid in formulating your opinion?

‘ANSWER: No.

‘2. Reasoning:

‘a. Understanding this 48-year-old, unsophisticated, Puerto Rican veteran's illness requires both medical and cultural perspectives. The evidence from professionals clearly supports the presence of an intermittent, severe, progressively disabling psychiatric disorder that takes the form of PTSD at least since 1985. The suicidal attempt in 1975 and testimony from the family suggests an earlier onset. The negative examination for 'back injury’ May 19, 1986, can be seen as consistent with neighbors' written statements saying that at times the patient appears as a normal, concerned father and at other times, angry and irrational. An additional diagnosis of schizophrenia is understandable considering his paranoia, visual and auditory 'hallucinations,' and periodic somewhat bizarre violence and cannot be ruled out; but these symptoms are also consistent with severe PTSD and should be explained under one diagnosis, if possible. A score of 157 on the Mississippi Scale for PTSD supports the diagnosis of PTSD. The issue of alcoholism is relevant only in that periodic substance abuse is characteristic of most veterans with PTSD. Records from his reported repeated VA hospitalizations are surprisingly missing.

***6** ‘b. If any testimony of the patient's family, relatives, friends, and neighbors is given credibility, a clear connection of the man's tour in Vietnam is evident from the content of his outbursts since very soon after his return. His recent compulsive, repetitious viewing of Vietnam movies has only confounded the symptoms. After reviewing all of the evidence in the record, the possibility of a conspiracy of family, friends, and professionals to create a case for PTSD after the fact is considered unlikely. While there are some inconsistencies, they are not vital. The man's wife--poor, rural, uneducated, without a supportive family of her own, married after two week's acquaintance at age 15, not sophisticated enough even to seek help after years of periodic abuse by the patient--is an unlikely candidate for fraud. When the patient and his family moved to New York in the mid-70's and the wife learned about the new Vets Center which opened in 1981, she began participating in treatment. A concept of PTSD only began to be available in our culture in 1980.

‘c. The one missing piece has been independent evidence of an appropriate stressor in Vietnam. The patient's testimony, that he was not assigned his MOS of crane operator but spent his entire time in Vietnam on guard duty inside or outside the base perimeter, is considered a clear possibility considering his marginal sophistication and the need for base security. Evidence is conflicting regarding how often the base came under attack. The man's poor memory for names, dates and details about his Vietnam tour has precluded supportive evidence from the Army. He states that he tried to forget what happened in Vietnam, a not uncommon tendency in veterans afflicted with PTSD which is also consistent with his apparent lack of sophistication. His story of killing teen-age Vietcong and the rape story are at least consistent in much of the testimony. It would seem unjust to withhold an otherwise compelling diagnosis on this point alone, given the policy of giving the veteran the benefit of the doubt.‘

In light of the entire evidentiary picture and especially the aforementioned VA expert's psychiatric opinion, which was based on a study of all evidence of record and is clearly and unequivocally supportive of the veteran's claim for service connection, I believe the findings and conclusions of my colleagues are so contrary to the overwhelming preponderance of the evidence as to be clearly factually and legally erroneous and unjust. Accordingly, I would substitute the following finding of fact for those listed previously:

FINDING OF FACT

The veteran served in Vietnam from October 1966 to September 1967 and has post-traumatic stress disorder resulting from events experienced during that service.

I would substitute the following conclusion of law for that offered by my colleagues:

CONCLUSION OF LAW

Post-traumatic stress disorder was incurred in service. 38 U.S.C. § 1110.

***7** WARREN W. RICE, JR.

NOTICE OF APPELLATE RIGHTS: Under 38 U.S.C. § 7266 (1991), a decision of the Board of Veterans' Appeals granting less

than the complete benefit, or benefits, sought on appeal is appealable to the United States Court of Veterans Appeals within 120 days from the date of mailing of notice of the decision, provided that a notice of disagreement concerning an issue which was before the Board was filed with the agency of original jurisdiction on or after November 18, 1988. Veterans' Judicial Review Act, Pub. L. No. 100-687, § 402 (1988). The date which appears on the face of this decision constitutes the date of mailing and the copy of this decision which you have received is your notice of the action taken on your appeal by the Board of Veterans' Appeals.

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ADDENDUM:

Decisions by a section of the Board shall be made by a majority of the members of the section. The decision of the section is final unless the Chairman orders reconsideration of the case. (38 U.S.C. § 7103(a) (1991) (formerly 38 U.S.C. § 4003(a)) I have reviewed this decision and note that the majority of the members of the section have voted to deny the relief sought on appeal. I have decided not to order reconsideration. Accordingly, the decision of the majority to deny the relief sought on appeal is final.

CHARLES L. CRAGIN Chairman

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Bd. Vet. App. 9207950, 1992 WL 12112900

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Bd. Vet. App. 9216746, 1992 WL 12112052

Board of Veterans Appeals

Department of Veterans' Affairs

[TITLE REDACTED BY AGENCY]

*1 Y92 BOARD OF VETERANS' APPEALS WASHINGTON, D.C. 20420

90-54 667
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THE ISSUE
Entitlement to service connection for post-traumatic stress disorder (PTSD).

REPRESENTATION
Appellant represented by: Department of Veterans Affairs, Virginia
WITNESS AT HEARING ON APPEAL: Veteran
ATTORNEY FOR THE BOARD: G. Wm. Thompson, Counsel

INTRODUCTION

The veteran had active service from November 1962 to November 1966.

This matter originated with a rating action in March 1988, from the Roanoke, Virginia, Regional Office (RO). The case was before the Board of Veterans' Appeals (Board) in March 1990, and remanded, for further development, in April 1991. The case was returned to the Board in February 1992. The veteran has been represented throughout this appeal by the Department of Veterans Affairs, Virginia, and that organization submitted additional written arguments on behalf of the veteran, dated in April 1992.

CONTENTIONS OF APPELLANT ON APPEAL

The veteran asserts that the RO committed error by not giving appropriate consideration to his claim for service connection post-traumatic stress disorder (PTSD). He points out that he was in Vietnam, and has a VA diagnosis of PTSD. It is contended that the veteran did participate in combat and experienced traumatic events of sufficient proportion to precipitate post-traumatic stress disorder.

DECISION OF THE BOARD

For the reasons and bases hereinafter set forth, it is the decision of the Board that the preponderance of the evidence is against the veteran's claim of service connection for post-traumatic stress disorder.

FINDINGS OF FACT

1. To the extent possible, relevant evidence necessary for an equitable disposition of the veteran's appeal has been obtained by the originating agency.

2. The veteran has no awards or decorations denoting direct combat participation.

3. Prior to 1989, there were multiple psychiatric diagnoses for the veteran, other than post-traumatic stress disorder.

4. The 1989 diagnosis of post-traumatic stress disorder was not based on verified stressors.

5. The veteran did not participate in an effort to verify claimed traumatic combat experiences/stressors and he has advanced conflicting statements on behalf of his claim.

6. The diagnosis of post-traumatic stress disorder, to include a recognizable stressor, is not substantiated by the entire evidence of record.

CONCLUSION OF LAW

Post-traumatic stress disorder was not incurred in or aggravated by active military service. 38 U.S.C. §§ 1110, 1131, 5107(a) (1992); 38 C.F.R. § 3.303(b) (1991).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

We note that we have found that the veteran's claim is 'well grounded' within the meaning of 38 U.S.C. § 5107(a) (1992). That is, we find that he has presented a claim which is plausible. The case was remanded in April 1991 for additional development, to include, importantly, a request that the veteran provide specific information in regard to dates, places, names, and units of assignments that were the basis for the veteran's nightmares and flashbacks. A basic requirement in all PTSD cases is verification of stressors. For whatever reason, the veteran chose not to respond to the request for the information requested. There is no indication that there are additional records, germane to the veteran's claim, which can be obtained without the veteran's assistance. We therefore find no further assistance to the veteran is required to comply with the duty to assist mandated by 38 U.S.C. § 5107(a).

***2** Available records show that the veteran spent a little over 1 year and 1 month overseas. He arrived in Da Nang, Vietnam, on July 30, 1965, and departed on July 20, 1966. Service administrative records do not reflect any awards or decorations denoting direct combat participation; no retroactive award of the Combat Action Ribbon is reported. On the date of the veteran's arrival at Da Nang, he was assigned to Company B, 9th Motor Transport Battalion, 3rd Marine Division as a motor vehicle operator. He served as a motor vehicle operator in Company A, 9th Motor Transport Battalion, 3rd Marine Division, from August 1, 1965, to May 18, 1966, at which time he became an assistant battalion police sergeant, at Headquarters Company, Headquarters Battalion, 3rd Marine Division, until July 20, 1966. While a motor vehicle operator, he participated in operations around Da Nang, Operation 'Double Eagle' at Tam Kay, Operation 'Roughrider' at Phu Bai, and while a police sergeant he participated in 'counterinsurgency operations.'

The veteran, in 1987, reported that while in Vietnam he was with the 1st Battalion, 9th Marines. There is a letter from the United States Army and Joint Services Environmental Support Group, dated in mid-August 1989, to the effect that the veteran was with Company A, 1st Battalion, 9th Marines, from July 30, 1965, to July 20, 1966. Information was then provided concerning casualties for that unit from January to March 1966. This Board has pointed out above, that available service records for the veteran show that he was in Company A, 9th Motor Battalion, 3rd Marine Division, from August 1965 to May 1966. It appears that there is some discrepancy between material reported by the Environmental Support Group, and the veteran's service records concerning his unit assignments while in Vietnam. The Board's efforts to reconcile these differences foundered on the veteran's reluctance to provide additional information concerning dates, places, names and unit of assignments while in Vietnam.

A review of the evidence of record shows that for the period from November 1975 through 1988, there are a variety of psychiatric diagnoses for the veteran, to include schizoid personality, depression versus evolving psychotic process, adjustment disorder with a mixed disorder of emotional conduct, alcohol and marijuana abuse, PTSD and dysthymic disorder. In 1987, it was reported that the veteran's flashbacks had included seeing his dead parents telling him to 'come to the next world.' The veteran was found to have paranoid references, obsessions and delusions. When provided psychiatric examination by the VA in June 1989, it was recorded that the veteran was a very poor historian, and during the course of the interview he changed the dates of his service in Okinawa and Vietnam 3 or 4 times. The veteran reported that he was involved in combat activities in Vietnam and on the day after he left Vietnam his unit was completely annihilated. He complained about nightmares dealing with people being killed and frequent startle reactions from sudden noises of people approaching him from behind. The examiner noted that the veteran's description of events was rather vague and, when the examiner tried to pin the veteran down, the veteran's usual answer was that all this happened a long time ago and he couldn't be expected to remember it. Following the examination, the examiner opined that while the veteran carried a diagnosis of PTSD from the mental hygiene clinic, in the absence of any collateral information, he had some doubt that it was genuinely PTSD and that the veteran primarily had a personality disorder; however, based on the available medical records and some features of the current interview, the previous diagnoses were repeated. The Axis I diagnosis was post-traumatic stress disorder, delayed, and the Axis II diagnosis was mixed personality disorder.

***3** In Wood v. Derwinski, 1 Vet.App. 190 (1991) the United States Court of Veterans Appeals affirmed a decision by the Board of Veterans' Appeals (BVA) denying service connection for post-traumatic stress disorder which was first diagnosed several years following separation from service. The denial was essentially based on the absence of any evidence of a significant stressor, other than the veteran's statements. The VA had made attempts to verify the traumatic events and verification could not be provided due to lack of specific information concerning the incidents alleged. The Court noted that, contrary to the contentions of the appellant, the BVA was not bound to accept his corroborated account of his Vietnam experiences. The affirmance of the denial by the Court was based, in part, on a factual finding by the BVA that there was no independent corroboration of 'stressors' arising from the appellant's military service. The Court also found that the VA's attempts at verification were adequate. The Court pointed out that: 'The duty to assist is not always a one-way street. If a veteran wishes help, he cannot passively wait for it in those circumstances where he may or should have information that is essential in obtaining the putative.' (Wood at 193) In this case, the veteran was diagnosed as having PTSD years after service, and the diagnoses were based on the veteran's uncorroborated account of his Vietnam experiences. The Board has attempted to verify the claimed stressors, but the veteran did not cooperate. Additionally, in this case, there are multiple psychiatric diagnoses for the veteran, other than post-traumatic stress disorder, and the veteran's psychiatric symptoms have included visual hallucinations of his dead parents, which is certainly not a symptom of PTSD. Diagnostic and Statistical Manual of Mental Disorders, 3rd ed., 1987. Additionally, the veteran has reported hearing voices and has made paranoid references. Absent any evidence of verifiable significant stressors, other than the veteran's unsubstantiated statements, the Board is not persuaded by the evidence of record that the veteran has post-traumatic stress disorder. For service connection to be granted under the VA regulations, the evidence must establish that a particular injury or disease resulting in disability was incurred coincident with service. This may be accomplished by affirmatively showing inception or aggravation during service. 38 C.F.R. § 3.303(a) (1991). In this case, there is no creditable evidence confirming the alleged stressors, the basis for a diagnosis of post-traumatic stress disorder. 38 U.S.C. § 1110; 38 C.F.R. § 3.303.

ORDER

Service connection for post-traumatic stress disorder is denied.

BOARD OF VETERANS' APPEALS WASHINGTON, D.C. 20420

RICHARD B. FRANK [a1]

RICHARD B. FRANK [a1]

PHILIP E. WRIGHT

a1 38 U.S.C. § 7102(a)(2)(A) (1992) permits a Board of Veterans' Appeals Section, upon direction of the Chairman of the Board, to proceed with the transaction of business without awaiting assign

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Bd. Vet. App. 9216746, 1992 WL 12112052

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Bd. Vet. App. 9624979, 1996 WL 33599206

Board of Veterans Appeals

Department of Veterans' Affairs

[TITLE REDACTED BY AGENCY]

94-10 673
Decision Date: 09/04/96
Archive Date: 09/11/96

***1** On appeal from the Department of Veterans Affairs Regional Office in Columbia, South Carolina

THE ISSUE

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

REPRESENTATION

Appellant represented by: The American Legion
AT#Appellant represented by: The American Legion: WITNESS AT
ATTORNEY FOR THE BOARD: J. R. Bryant, Associate Counsel

INTRODUCTION

The veteran served on active duty from October 1950 to October 1952 and November 1953 to January 1972.

This matter is before the Board of Veterans' Appeals (Board) of the Department of Veterans Affairs (VA) on appeal from a rating determination of March 1993, by the Columbia, South Carolina Regional Office (RO), which denied service connection for PTSD.

CONTENTIONS OF APPELLANT ON APPEAL

The veteran contends that he has PTSD as a result of traumatic experiences that occurred during combat service in Vietnam.

DECISION OF THE BOARD

The Board, in accordance with the provisions of 38 U.S.C.A. § 7104 (West 1991 & Supp. 1995), has reviewed and considered all of the evidence and material of record in the veteran's claims file. Based on its review of the relevant evidence in this matter, and for the following reasons and bases, it is the decision of the Board that a preponderance of the evidence is against the claim for service connection for PTSD.

FINDINGS OF FACT

1. The veteran performed active duty in Vietnam which is not shown to have involved actual combat with the enemy.

2. A stressor for PTSD during military service has not been documented.

3. The medical record does not contain a definite clinical diagnosis of PTSD related to military service.

CONCLUSION OF LAW

PTSD was not incurred in or aggravated by active military service. 38 U.S.C.A. § 1110, 5107(a), 7104 (West 1991 & Supp. 1995).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

Factual Background. According to his service personnel records, the veteran served three separate tours of duty in Vietnam from May 7, 1966 to May 10, 1967, from December 19, 1967 to July 22, 1969 and from December 4, 1969 to November 14, 1970. His military occupational specialty (MOS) was that of automotive repairman. His medals and decorations include the National Defense Service Medal with oak leaf cluster, the Bronze Star Medal with oak leaf cluster, the Vietnam Service Medal and the Good Conduct Medal. Service medical records are entirely negative for psychiatric abnormality.

VA outpatient treatment reports from June 1989 to November 1990 indicate the veteran had symptoms of PTSD but do not provide evidence of any adequate stressor event. The veteran said he spent time with the infantry and special forces and was exposed to heavy rocket fire and explosions during rocket attacks and claimed he was in the TET 1968 Battle when the Viet Cong overran Saigon. The veteran reported having flashbacks and startling easily over noises. He related that he thinks daily about the deaths and injuries of friends and saw a large number of dead bodies with missing parts and in various stages of decay. He dreams of Vietnam in cycles almost daily and complained of mood swings, depression, withdrawal and feelings of hopelessness. The examiner also noted that the veteran's recent retirement probably made the depression a little worse.

***2** In a statement dated in October 1990 the veteran listed as stressful events, the constant fear of being ambushed, enduring mortar and rocket attacks, recovering and repairing destroyed vehicles that 'still had signs of war on them' and his participation in convoy escorts.

The veteran was hospitalized at a VA facility in May 1991. He was admitted with a diagnosis of major depression which was not responding to outpatient treatment according to his physician. He became symptomatic one month prior to admission with insomnia, anergia, preoccupation with post war experiences, agitation, frequent crying and suicidal ideations. During hospitalization, he attended psychotherapy group, Viet Nam Vet Group. The diagnoses at hospital discharge included recurrent major depression.

Service connection for PTSD was denied by a March 1993 rating decision. The RO found that although available outpatient treatment reports contained a diagnosis of PTSD, the veteran had not described stressors of sufficient severity as to have caused PTSD in almost anyone and did not have an MOS or medals indicative of combat service. The veteran appealed this determination and in his notice of disagreement provided further information regarding alleged stressful events in Vietnam. He stated that he was required to travel by helicopter to outlying posts to perform maintenance and was constantly in fear of crashing and being captured by the enemy and when he traveled by motor vehicle, there was always the fear of ambush. The veteran stated that although he did not have a combat MOS, he was regularly exposed to sniper fire and always in fear of his life and well being.

A VA examination was performed in May 1993 in response to the veteran's notice of disagreement. He described being nervous much of the time and of having a bad temper. He also complained of occasional nightmares, frequent crying spells and feelings of anxiety. He noted periods of depression for which he was hospitalized two years ago. He complained of awakening early in the morning apparently unable to sleep. He had a history of heavy drinking but had not done so in a number of years. He related to the examiner incidents of being shelled, rocket attacked and exposed to sniper fire. The examiner noted the veteran did not center on any incidents of overwhelming stress and that despite occasional thoughts

of Vietnam during the day, he did not think about any specific events. The veteran worked as an auto mechanic for 10 years and has been married for 22 years stating that he has a pretty good relationship with his wife. He has some friends but tends to stay to himself. A diagnosis of affective disorder, major depression, recurrent was made. The examiner added that while the veteran was probably stressed by Vietnam, he did not remember any incidents of overwhelming stress and did not appear to have intrusive thought. He felt the veteran had been treated for his depression with some success and considered him mildly to moderately disabled.

***3** At a hearing in January 1994, the veteran testified that he was also involved in the retrieval of U.S. casualties and saw enemy dead as well. He assisted in the loading of body bags on trucks. Additional outpatient treatment reports from November 1991 through September 1993 showed diagnoses of depression, dysthymia and depressive disorder but no indication of PTSD.

Analysis. The Board finds that the veteran's claim is well grounded within the meaning of 38 U.S.C.A. § 5107(a) (West 1991 & Supp. 1995). That is, it is 'a plausible claim, one which is meritorious on its own or capable of substantiation.' Murphy v. Derwinski, 1 Vet.App 78, 81 (1990).

The law permits the granting of service connection for a disability which results from disease or injury incurred in or aggravated by active military service. 38 U.S.C.A. § 1110, 1131 (West 1991 & Supp. 1995). In claims for service connection for PTSD, VA regulation 38 C.F.R. § 3.304(f) (1995), is applicable:

Service connection for post-traumatic stress disorder requires medical evidence establishing a clear diagnosis of the condition, credible supporting evidence that the claimed inservice stressor actually occurred, and a link established by medical evidence, between current symptomatology and the claimed inservice stressor. If the claimed stressor is related to combat, service department evidence that the veteran engaged in combat or that the veteran was awarded the Purple Heart, Combat Infantryman Badge, or similar combat citation will be accepted, in the absence of evidence contrary, as conclusive evidence of the claimed inservice stressor.

Medical evidence pertaining to the veteran's current psychiatric status consists of a PTSD examination conducted by the VA in May 1993 and outpatient treatment records covering the period June 1989 to September 1993. Treatment records prior to November 1990 describe a number of symptoms which were found to fit the diagnostic criteria of PTSD and such a diagnosis was given. However, the examiner at the 1993 VA examination found that the veteran's symptoms did not meet the criteria for PTSD and gave a diagnosis of affective disorder, major depression, recurrent. The remaining treatment reports covering the period from November 1991 to September 1993 also do not contain diagnoses of PTSD.

An essential prerequisite for a diagnosis of PTSD is that there have been a verifiable 'stressor'. A stressor is defined as a life-threatening circumstance or other event that is outside the range of usual human experience and that would be markedly distressing to almost anyone. Zarycki v. Brown, 6 Vet.App. 91, 99 (1993). In assessing a stressor for PTSD, a distinction may properly be drawn between the stress of ordinary traumatic circumstances and the 'ordinary' stress experienced by anyone in a war zone. Wood v. Derwinski, 1 Vet.App. 190 (1991). The Court indicated that the Board is not obligated to accept a claimant's uncorroborated account of his Vietnam experiences. See Wood, supra. Furthermore, VA regulations require corroboration of stressors for PTSD if the veteran is not shown to have engaged in actual combat. 38 C.F.R. § 3.304(f) (1995).

***4** Whereas the veteran's claim is somewhat supported by the treatment reports prior to 1991, the symptoms identified by the examiner, do not provide a basis for a diagnosis of PTSD, given the lack of adequate stressors. There is no information in the record concerning the extent to which the veteran engaged in combat with the enemy. The veteran served as an auto repairmen with no other activity verified and he is not shown to have received awards or decorations which signify combat. Since actual combat is not documented, the veteran is not relieved of his obligation to provide corroboration of actual stressor events. Wood v. Derwinski, 1 Vet.App. 190 (1991). The Board has also considered the

veteran's testimony of his involvement in the retrieval of U.S. casualties. However, when it is determined that the veteran did not engage in combat with the enemy, lay testimony by itself will not be enough to establish the occurrence of the alleged stressor. Instead, the record must contain service records which corroborate the veteran's testimony as to the occurrence of the claimed stressors. 38 U.S.C.A. § 1154(b) (West 1991 & Supp. 1995);38 C.F.R. § 3.304(d), (f) (1995); Zarycki v. Brown, 6 Vet.App. 91 (1995); West v. Brown, 7 Vet.App. 70 (1994). In addition, the alleged stressors reported by the veteran including exposure to mortar attacks and the constant fear of being ambushed did not expose the veteran to anything more than the ordinary stress of being in a war zone. Thus a basis for the diagnosis of PTSD has not been demonstrated.

The Board finds that such evidence against a diagnosis of PTSD outweighs that which favors the diagnosis. See Burger v. Brown, 5 Vet.App. 340 (1993). The VA examiner in 1993 clearly found that the veteran did not have PTSD. The Board finds this assessment to be particularly probative as it was not based on the unsubstantiated reports of stressors or episodes involving insufficient stress as provided by the veteran. The Board has considered the veteran's hearing testimony. While the Board accepts as credible the veteran's assertions regarding the symptoms which he currently experiences, he is not medically competent to render a diagnosis of PTSD. Also, as noted earlier, lay testimony, in itself, is not sufficient to establish the occurrence of an alleged stressor. Accordingly, it is the opinion of the Board that a preponderance of the evidence is against the claim for service connection for PTSD and that the benefit of the doubt rule does not apply. The evidence is this regard is not in equipoise because evidence relating to the diagnosis of PTSD is not supported by the record. 38 U.S.C.A. § 5107(b) (West 1991 & Supp. 1995). The veteran is advised that if at some future time he wishes to submit additional information in the development of the evidence to support his claim, he can reopen his claim by submitting new and material evidence. 38 U.S.C.A. § 5108 (West 1991 & Supp. 1995); 38 C.F.R. § 3.156(a) (1995). If found to be reopened, the claim will be reviewed without regard to prior adjudication. Manio v. Derwinski, 1 Vet.App. 140 (1990).

ORDER

***5** Entitlement to service connection for PTSD is denied.

BARBARA B. COPELAND
Member, Board of Veterans' Appeals

The Board of Veterans' Appeals Administrative Procedures Improvement Act, Pub. L. No. 103-271, § 6, 108 Stat. 740, 741 (1994), permits a proceeding instituted before the Board to be assigned to an individual member of the Board for a determination. This proceeding has been assigned to an individual member of the Board.

NOTICE OF APPELLATE RIGHTS: Under 38 U.S.C.A. § 7266 (West 1991 & Supp. 1995), a decision of the Board of Veterans' Appeals granting less than the complete benefit, or benefits, sought on appeal is appealable to the United States Court of Veterans Appeals within 120 days from the date of mailing of notice of the decision, provided that a Notice of Disagreement concerning an issue which was before the Board was filed with the agency of original jurisdiction on or after November 18, 1988. Veterans' Judicial Review Act, Pub. L. No. 100-687, § 402, 102 Stat. 4105, 4122 (1988). The date which appears on the face of this decision constitutes the date of mailing and the copy of this decision which you have received is your notice of the action taken on your appeal by the Board of Veterans' Appeals. - 2 -

Bd. Vet. App. 9624979, 1996 WL 33599206

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Bd. Vet. App. 9905665, 1999 WL 33856104

Board of Veterans Appeals

Department of Veterans' Affairs

[TITLE REDACTED BY AGENCY]

94-41 698
Decision Date: 02/26/99
Archive Date: 03/03/99

***1** On appeal from the Department of Veterans Affairs Regional Office in Newark, New Jersey

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

REPRESENTATION
Appellant represented by: Disabled American Veterans
AT#Appellant represented by: Disabled American Veterans: WITNESS AT
ATTORNEY FOR THE BOARD: K. J. Loring, Associate Counsel

INTRODUCTION

The veteran had active military service from November 1969 to November 1971.

This matter arises from a June 1993 rating decision from the Department of Veterans Affairs (VA) Regional Office (RO) in Newark, New Jersey, which denied the benefit sought on appeal. The case was referred to the Board of Veterans' Appeals (Board) for resolution. The veteran appeared for a hearing before the undersigned Board Member in January 1997. Subsequent to the hearing, the case was remanded for additional development. The RO subsequently denied the veteran's claim and returned the case to the Board for appellate review.

FINDINGS OF FACT

1. The veteran has bipolar disorder in full remission.

2. There is no medical evidence to link the veteran's bipolar disorder to military service and no diagnosis of PTSD that is related to service.

CONCLUSION OF LAW

Post traumatic stress disorder was not incurred during service. 38 U.S.C.A. §§ 1110, 5107 (West 1991); 38 C.F.R. §§ 3.102, 3.303 (1998).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

As a preliminary matter, the Board finds that the veteran's claim for service connection for PTSD is well grounded. 38 U.S.C.A. § 5107(a). That is, the Board finds that the veteran has presented a claim which is not implausible when his contentions and the evidence of record are viewed in the light most favorable to that claim. The Board is also satisfied that

all relevant facts have been properly and sufficiently developed and that no further assistance to the veteran is required in order to comply with the duty to assist him mandated by 38 U.S.C.A. § 5107(a).

A well-grounded claim for service connection for PTSD is comprised of medical evidence of current disability, lay evidence of an in-service stressor, and medical evidence of a nexus between service and the current PTSD disability. Cohen v. Brown, 10 Vet. App. 128, 138 (1997); 38 C.F.R. § 3.304(f) (1998).

The claims file indicates that the veteran was diagnosed with PTSD on two occasions. Once during a VA hospital admission for treatment of bipolar disorder in 1984, and subsequent to a VA psychiatric examination in December 1991. The VA examiner noted that the veteran's 'symptoms and stressors were consistent with a diagnosis of post traumatic stress disorder, but on the basis of past history, this ha[d] matured into a bipolar disorder.' While the Board finds that these diagnoses suffice to lay the foundation for a well-grounded claim, the preponderance of the evidence shows that the veteran does not have PTSD related to service.

***2** The veteran served in Vietnam from June 1970 to April 1971. His military occupational specialty was as a motor vehicle operator. He reported that he also operated the 50 caliber machine gun attached to his truck on occasion. He reported as stressors a July 1970 incident when his truck convoy hit a land mine, injuring three soldiers, and an August 1970 incident in Khe Sanh when his convoy was repeatedly shelled. The RO was able to verify that one of the three soldiers identified by the veteran was wounded in action in November 1970, the other two soldiers' names were listed without reference to injury. The August 1970 report of shelling was not verified.

Nonetheless, the Board presumes the veteran's account of his experiences to be credible and concedes that he witnessed the wounding of three soldiers. However, as discussed in the following analysis, the Board concludes that the veteran is without a confirmed diagnosis of PTSD that is related to service.

The veteran's service medical records are completely devoid of any complaints or clinical findings with regard to his mental health. However, he has an extensive history of hospital admissions for treatment of bipolar disorder, beginning in 1974 through 1991. His records are replete with multiple admissions for psychosis associated with his bipolar disorder and periods of excessive alcohol intake. There is no medical evidence to relate the veteran's bipolar disorder to any incident of military service.

In July 1991, in conjunction with his claim, the veteran submitted a statement from a VA psychologist which reflected a diagnosis of PTSD. The psychologist did not elaborate or delineate the basis for the diagnosis. The only other diagnosis of PTSD, offered by a VA examiner, in his December 1991 report, found that the veteran's PTSD had 'matured' to bipolar disorder. He appeared to have based his PTSD finding upon the veteran's reported history of being involved in a truck accident and witnessing the amputation of another soldier's leg caused by the veteran's firing of a gun. Neither of these incidents has been verified.

In January 1998, the veteran was afforded a VA psychiatric examination to determine the presence of PTSD. The examiner recounted the veteran's family and medical history and noted that the veteran began 'heavy alcohol consumption' when he was about 12 years old. He further observed that the veteran reported increased experience and knowledge in managing his bipolar disorder, particularly through medication and domestic stability.

The veteran reported to the examiner his recollection of the November 1970 incident (previously identified by the veteran as July 1970). He reported disbelief surrounding the incoming fire approximately 200 yards away, which destroyed the Army truck and wounded three men, and fear regarding the mortars which exploded close to him. The examiner fully evaluated the veteran's responses and found that the he did not meet the criteria for a diagnosis of PTSD. Specifically, he stated that the reported stressful incident did not, in his professional opinion, support a diagnosis of PTSD. He found

that the veteran had an Axis I diagnosis of bipolar I disorder, manic, in full remission, with a global assessment of functioning (GAF) scaled score of 65.

***3** The Board notes that while the veteran has presented evidence of a diagnosis of PTSD, he has failed to provide credible evidence to support his contentions that the claimed in- service stressors, which served as a basis for the diagnosis, actually occurred. 38 C.F.R. § 3.304(f). In the instant case, there was no report of stressors in the VA psychologist's July 1991 statement, and the stressors reported during the December 1991 VA examination report were not related to combat. One incident involved a motor vehicle accident and the other involved the veteran's test firing of a weapon. Under current legal standards, if a claimed stressor is not related to combat, there must be independent evidence to corroborate the veteran's statement as to the occurrence of the claimed stressor. Zarycki v. Brown, 6 Vet.App. 91, 99 (1993). Consequently, as there is no independent verification of these events, they are insufficient to give rise to a valid diagnosis of PTSD.

Accordingly, as the stressors cited as a basis for the 1991 PTSD diagnosis have not been verified by credible supporting evidence, and there is no report of stressors for the earlier diagnosis, the Board finds no reasonable basis to conclude that the PTSD diagnosed on two occasions is related to military service. Moreover, as there are multiple hospital discharge summaries up through 1991 reporting a single diagnosis of bipolar disorder, and a January 1998 VA examination report indicating that the veteran did not meet the criteria for a PTSD, notwithstanding verification of reported stressors, the Board concludes that the preponderance of the evidence is against the veteran's claim.

The Board considered and found no evidence in relative equipoise, such that would require application of the doctrine of reasonable doubt. 38 U.S.C.A. § 5107(b); Gilbert v. Derwinski, 1 Vet. App. 49, 54 (1990).

ORDER

Entitlement to service connection for post traumatic stress disorder is denied.

BRUCE KANNEE
Member, Board of Veterans' Appeals

NOTICE OF APPELLATE RIGHTS: Under 38 U.S.C.A. § 7266 (West 1991 & Supp. 1998), a decision of the Board of Veterans' Appeals granting less than the complete benefit, or benefits, sought on appeal is appealable to the United States Court of Veterans Appeals within 120 days from the date of mailing of notice of the decision, provided that a Notice of Disagreement concerning an issue which was before the Board was filed with the agency of original jurisdiction on or after November 18, 1988. Veterans' Judicial Review Act, Pub. L. No. 100-687, § 402, 102 Stat. 4105, 4122 (1988). The date which appears on the face of this decision constitutes the date of mailing and the copy of this decision which you have received is your notice of the action taken on your appeal by the Board of Veterans' Appeals.

Bd. Vet. App. 9905665, 1999 WL 33856104

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Bd. Vet. App. 1420573, 2014 WL 3514795

Board of Veterans Appeals

Department of Veterans' Affairs

[TITLE REDACTED BY AGENCY]

13-07 650
Decision Date: 05/07/14
Archive Date: 05/21/14

***1** On appeal from the Department of Veterans Affairs Regional Office in Honolulu, Hawaii

THE ISSUES

1. Entitlement to an effective date earlier than November 3, 2009, for the grant of service connection for posttraumatic stress disorder (PTSD).

2. Entitlement to an initial disability evaluation in excess of 10 percent for PTSD.

REPRESENTATION

Veteran represented by:Disabled American Veterans
WITNESS AT
HEARING ON APPEAL
The Veteran
ATTORNEY FOR THE BOARD
D. Martz Ames, Counsel

INTRODUCTION

The Veteran had active service from June 1986 to February 1995.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from an August 2011 rating decision of the Department of Veterans Affairs (VA) Regional Office (RO) in Honolulu, Hawaii.

A review of the Virtual VA paperless claims processing system reveals additional VA treatment records from July 2011 to October 2012. In the December 2012 Statement of the Case (SOC), the RO specifically stated that these records were reviewed prior to the adjudication of the claims. Virtual treatment records from March 2013 were specifically reviewed in the May 2013 Supplemental Statement of the Case. Therefore there is no prejudice to the Veteran in the Board's adjudication of his claims. Additional electronic records that are not pertinent to the Veteran's claims are associated with his electronic claims file in the Veterans Benefits Management System (VBMS). Any future consideration of this case should take into consideration the existence of this electronic record.

The Veteran testified at a hearing in August 2013 before the undersigned. A copy of the transcript has been placed in the Virtual VA paperless claims processing system. The record was held open for an additional 30 days, during which

he submitted additional evidence and waived his right to have it initially considered by the RO. 38 C.F.R. §§ 20.800, 20.1304(c) (2013).

THE ISSUE of entitlement to service connection for sleep apnea secondary to service-connected PTSD was raised in a March 2014 statement from the Veteran that was associated with his electronic claims file in the VBMS. This issue has not been adjudicated by the Agency of Original Jurisdiction (AOJ). Therefore, the Board does not have jurisdiction over it, and it is referred to the AOJ for appropriate action. 38 C.F.R. § 19.9(b) (2013).

THE ISSUE of entitlement to an initial disability evaluation in excess of 10 percent for PTSD is addressed in the

REMAND

portion of the decision below and is

REMAND

D to the AOJ.

FINDINGS OF FACT

1. A February 17, 2009 Board decision denied entitlement to service connection for PTSD.

2. The Veteran's petition to reopen a claim of entitlement to service connection for PTSD was received by VA on May 26, 2009.

***2** 3. The evidence of record does not show that the Veteran filed a formal or informal petition to reopen a claim of entitlement to service connection for PTSD prior to May 26, 2009.

4. The evidence of record does not show that entitlement to service connection for PTSD arose prior to May 26, 2009.

CONCLUSION OF LAW

The criteria for an effective date of May 26, 2009, but no earlier, for the grant of service connection for PTSD have been met. 38 U.S.C.A. §§ 5107(b), 5110 (West 2002); 38 C.F.R. §§ 3.102, 3.156(c), 3.155, 3.400 (2013).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

I. Duty to Notify and Assist

VA has met all statutory and regulatory notice and duty to assist provisions set forth in the Veterans Claims Assistance Act of 2000 (VCAA). 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2002 and Supp. 2013); 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326(a) (2013). Prior to initial adjudication, a letter dated in June 2011 satisfied the duty to notify provisions with regard to a petition to reopen and a claim for service connection. See 38 C.F.R. § 3.159(b)(1) (2013); Overton v. Nicholson, 20 Vet. App. 427 (2006); see also Dingess/Hartman v. Nicholson, 19 Vet. App. 473 (2006). The request for an earlier effective date is a downstream issue from the grant of the benefit sought. 38 U.S.C.A. § 5103(a) does not require VA to provide notice of this information for newly raised or ‘downstream‘ issues in response to notice of its decision on a claim for which VA has already given the appropriate section 5103(a) notice. See VAOPGCPREC 8-2003

(Dec. 22, 2003). Once a Notice of Disagreement (NOD) from a decision establishing service connection and assigning the rating and effective date has been filed, the notice requirements of 38 U.S.C.A. §§ 5104 and 7105 control as to the further communications with the appellant, including as to what 'evidence [is] necessary to establish a more favorable decision with respect to downstream elements....' Goodwin v. Peake, 22 Vet. App. 128, 137 (2008). In December 2012, the Veteran was provided the required SOC discussing the reasons and bases for not assigning an earlier effective date and citing the applicable statutes and regulations.

The Veteran's service treatment records, VA medical treatment records, service personnel records, and lay statements were obtained. There is no indication in the record that additional evidence relevant to the issue decided herein is available and not part of the claims file. The Veteran was provided with a hearing in August 2013. During this hearing, the Board suggested the submission of evidence that would assist the Veteran in substantiating his claim. Specifically, the Veteran was asked whether he received VA or private treatment. Further, the elements necessary to substantiate a claim for an earlier effective date were explained. See Bryant v. Shinseki, 23 Vet. App. 488 (2010). As there is no indication that any failure on the part of VA to provide additional notice or assistance reasonably affects the outcome of this case, the Board finds that any such failure is harmless. See Mayfield v. Nicholson, 20 Vet. App. 537 (2006); see also Dingess/Hartman, 19 Vet. App. 473. Further, the purpose behind the notice requirement has been satisfied because the Veteran has been afforded a meaningful opportunity to participate effectively in the processing of his claims, to include the opportunity to present pertinent evidence. Shinseki v. Sanders, 129 S. Ct. 1696 (2009).

***3** II. Entitlement to an Effective Date Earlier than November 3, 2009, for the Grant of Service Connection for PTSD

The Veteran asserts that the effective date of the grant of service connection for PTSD should be August 29, 2003, the date he filed his initial claim for service connection this condition.

Except as otherwise provided, the effective date for a grant of compensation will be the day following separation from active service or the date entitlement arose, if a claim is received within one year of separation. 38 U.S.C.A. § 5110(a) (West 2002); 38 C.F.R. § 3.400(b)(2)(ii) (2013). Otherwise, the effective date of the award of an evaluation based on an original claim, a claim reopened after a final disallowance, or a claim for an increase will be the date of receipt of the claim or the date entitlement arose, whichever is later. Id.

Once a decision that establishes an effective date becomes final, the only way that such a decision can be revised is if it contains clear and unmistakable error (CUE). See Rudd v. Nicholson, 20 Vet. App. 296, 300 (2006) (holding that any other result would vitiate the rule of finality). Neither the Veteran nor his representative have asserted that a previous RO or Board decision contained CUE.

A. Date Entitlement Arose

Generally, service connection may be granted for a disability resulting from disease or injury incurred coincident with or aggravated by service. 38 U.S.C.A. §§ 1110, 1131 (West 2002 and Supp. 2013); 38 C.F.R. § 3.303(a) (2013). In order to establish service connection for the claimed disorder, there must be (1) medical evidence of a current disability; (2) medical, or in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and (3) medical, or in certain circumstances, lay evidence of a nexus between the claimed in-service disease or injury and the current disability. See 38 C.F.R. § 3.303 (2013); see also Hickson v. West, 12 Vet. App. 247, 253 (1999); Davidson v. Shinseki, 581 F.3d 1313, 1316 (Fed. Cir. 2009). The requirement of a current disability is 'satisfied when a claimant has a disability at the time a claim for VA disability compensation is filed or during the pendency of that claim.' See McClain v. Nicholson, 21 Vet. App. 319, 321 (2007).

'[E]ntitlement to benefits for a disability or disease does not arise with a medical diagnosis of the condition, but with the manifestation of the condition and the filing of a claim for benefits for the condition.' DeLisio v. Shinseki, 25 Vet.

App. 45, 56 (2011). However, 'it is the information in a medical opinion, and not the date the medical opinion [that] was provided that is relevant when assigning an effective date.' Tatum v. Shinseki, 24 Vet. App. 139, 145 (2010). And, if a veteran whose petition to reopen is granted and the claim is ultimately granted 'relies on the 'receipt of the claim' prong of § 3.400, rather than the 'date entitlement arose' prong, [the claimant] by definition had an entitlement to benefits that existed before the date of the relevant application to reopen.' Akers v. Shinseki, 673 F.3d 1352, 1359 (Fed. Cir. 2012).

***4** Here, the Veteran's claim of service connection was reopened and granted in August 2011. Although the Veteran filed a petition to reopen in May 2011, the RO granted his claim effective November 3, 2009, the date of a statement that the RO construed as a petition to reopen. This is recognition that entitlement to benefits existed before the date of the November 3, 2009 petition to reopen. See Akers, 673 F.3d at 1359.

B. Date of Claim

Because the facts found show that entitlement to service connection for PTSD arose prior to November 3, 2009, the remaining question is when the Veteran filed his instant petition to reopen. When a claim is reopened, the Veteran 'cannot obtain an effective date earlier than the reopened claim's application date.' Leonard v. Nicholson, 405 F.3d 1333, 1336-37 (Fed. Cir. 2005).

The Veteran filed his initial claim of entitlement to service connection for PTSD on August 29, 2003. The RO denied his claim in a December 2004 rating decision. The Veteran appeal his case and his claim was denied by the Board on February 17, 2009. When a rating decision issued by the RO is affirmed by the Board, that determination is considered final. See 38 U.S.C.A. § 7105(c) (West 2002); 38 C.F.R. § 20.1104 (2013). Further, the Board decision is also final. 38 C.F.R. § 20.1100 (2013). As noted above, there is no CUE motion currently before the Board. Because the February 17, 2009 Board decision is final, an effective date prior to then is not assignable. Therefore, the question thus becomes whether the Veteran filed a petition to reopen after the February 2009 Board denial, but before the present effective date of November 3, 2009.

A specific claim in the form prescribed by the VA must be filed in order for benefits to be paid or furnished to any individual under laws administered by the VA. 38 U.S.C.A. § 5101(a) (West 2002); 38 C.F.R. § 3.151(a) (2013). Any communication or action indicating intent to apply for one or more benefits under laws administered by the VA, and identifying the benefits sought, may be considered an informal claim. 38 C.F.R. § 3.155(a) (2013). The benefit sought must be identified, though it need not be specific. See Servello v. Derwinski, 3 Vet. App. 196, 199 (1992); see also Brokowski v. Shinseki, 23 Vet. App. 79, 86-87 (2009).

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 from the date it was sent to the claimant, it will be considered as filed as of the date of receipt of the informal claim. 38 C.F.R. § 3.155(a) (2013). If the formal claim is received after one year of its receipt, the effective date will be the date of VA's receipt of the formal application form. Jernigan v. Shinseki, 25 Vet. App. 220, 229 (2012). However, the effective date of a claim will be the date of the informal claim if VA did not send a claimant a formal application form after receiving an informal claim, as required by § 3.155, because the one-year time limit to return the formal claim did not begin. See, e.g., Quarles v. Derwinski, 3 Vet. App. 129, 137 (1992) (cited in Jernigan, 25 Vet. App. at 225, n.5).

***5** The Veteran filed his first petition to reopen his claim on May 26, 2009. He specifically stated that he wished to 'reopen' his claim for service connection for PTSD. The RO denied his petition in a September 2009 rating decision. On November 3, 2009, the Veteran filed a second statement, which the RO interpreted as a new petition to reopen his previously denied service connection claim, as opposed to an NOD. The RO then denied his claim again in a June 2010 rating decision. He filed another petition to reopen in July 2010 and the RO denied his claim again in a December 2010

rating decision. Finally, he filed a petition to reopen in May 2011. In the August 2011 rating decision on appeal, the RO reopened and granted his claim for service connection for PTSD effective November 3, 2009.

The Board construes the Veteran's November 3, 2009 statement to be a timely NOD to the September 2009 rating decision. In his statement, the Veteran asked the RO to 'reconsider' the September 2009 rating decision. Interpreting this statement in the most favorable light, the Board concludes that the Veteran was expressing disagreement with the September 2009 rating decision. Gallegos v. Principi, 283 F.3d 1309 (Fed. Cir. 2002); 38 C.F.R. § 20.201 (2013). As a result, the September 2009 RO decision is not final. 38 U.S.C.A. § 7105 (West 2002); 38 C.F.R. §§ 3.160(d), 20.200, 20.302, 20.1103 (2013). Therefore the proper effective date is May 26, 2009, the date he filed his first petition to reopen his claim for service connection for PTSD following the February 2009 final Board denial.

There are no informal claims of record between the Board's February 2009 denial and May 26, 2009 that would permit an even earlier effective date. Significantly, the first communication to VA from the Veteran following the February 17, 2009 Board denial was his May 26, 2009 petition to reopen. The claims file contains medical evidence that the Veteran's PTSD was present prior to May 26, 2009. These treatment records may not be considered an informal claim for service connection, however, because service connection for PTSD was not in effect at that time. Further, these medical records do not demonstrate an intention on the Veteran's part to seek service connection for such complaints. See 38 C.F.R. § 3.157(b) (2013) (2013); Servello, 3 Vet. App. at 199; see also Brannon v. West, 12 Vet. App. 32, 35 (1998) ('The mere presence of the medical evidence' showing treatment for that disorder 'does not establish an intent on the part of [a] veteran' to seek service condition for that disorder.); MacPhee v. Nicholson, 459 F.3d 1323 (Fed. Cir. 2006) (holding that medical records do not satisfy the regulatory requirements of an informal claim if the condition disclosed in the medical records had not previously been determined to be service-connected). Without a formal or informal petition to reopen the claim prior to May 26, 2009, an earlier effective date is not assignable. See 38 C.F.R. § 3.400(r) (2013).

***6** Finally, in June 2013, the Veteran's representative argued that under VBA Training Letter 10-05 (Relaxation of Evidentiary Standard for Establishing In-Service Stressors in Claims for Posttraumatic Stress Disorder - 38 C.F.R. § 3.304(f)(3) (July 16, 2010)), his stressor should have been conceded in an earlier decision because it was based upon fear. If a claim is reviewed within one year from the effective date of a liberalizing law or VA issue, benefits may be authorized from the effective date of a liberalizing law or VA issue. 38 U.S.C.A. § 5110(g); 38 C.F.R. §§ 3.114, 3.400(p) (2013). However, the amendments to 38 C.F.R. § 3.304(f)(3) are not considered a liberalizing law under 38 C.F.R. § 3.114 (2013). 75 Fed. Reg. 39843, 39851 (July 13, 2010).

For these reasons, an effective date of May 26, 2009, for the award of service connection for his PTSD, but not earlier, is warranted. This outcome results from resolving all reasonable doubt in the Veteran's favor.

ORDER

An earlier effective date of May 26, 2009, for the grant of service connection for PTSD is granted, subject to the laws and regulations governing the payment of monetary benefits.

REMAND

In this case, a remand is necessary because the evidence shows that the May 2013 VA examination does not convey the current severity of the Veteran's PTSD. Specifically, in an August 2013 statement, the Veteran reported periods of 'uncontrollable rage' and homicidal ideation. At his August 2013 hearing he testified that, among other symptoms, he had six or more panic attacks per week, thoughts of hurting himself and others, and memory impairment. See Palczewski v. Nicholson, 21 Vet. App. 174, 181 (2007); see also Weggenmann v. Brown, 5 Vet. App. 281, 284 (1993).

Accordingly, the case is

REMAND

D for the following action:

1. Schedule the Veteran for a psychiatric examination with an appropriate clinician to determine the current severity of his service-connected PTSD. The entire claims file (both the paper claims file and any relevant medical records contained in Virtual VA and VBMS) and a copy of this remand must be made available to the examiner for review, and the examiner must specifically acknowledge receipt and review of these materials in any reports generated.

a) The examiner must take a detailed history from the Veteran. If there is any clinical or medical basis for corroborating or discounting the credibility of the history provided by the Veteran, the examiner must so state, with a complete explanation in support of such a finding.

b) Taking into account the evidence in the claims file, the Veteran's lay statements, and his hearing testimony, the examiner must determine the current severity of the Veteran's PTSD, and its impact on his employability and daily activities. A GAF score should be provided, if possible.

c) The examiner must provide a complete explanation for his or her opinion(s), based on his or her clinical experience, medical expertise, and established medical principles. If any of the above requested opinions cannot be made without resort to speculation, the examiner must state this and specifically explain whether there is any potentially available information that, if obtained, would allow for a non-speculative opinion to be provided.

***7** 2. The RO must review the claims file and ensure that the foregoing development action has been completed in full. If any development is incomplete, appropriate corrective action must be implemented. If any report does not include adequate responses to the specific opinions requested, it must be returned to the providing examiner for corrective action.

3. Thereafter, and after undertaking any additional development deemed necessary, readjudicate the issue on appeal. If the benefit sought on appeal remains denied, in whole or in part, the Veteran and his representative should be provided with a Supplemental Statement of the Case and be afforded reasonable opportunity to respond. The case should then be returned to the Board for further appellate review, if otherwise in order

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

This claim must be afforded expeditious treatment. The law requires that all claims that are remanded by the Board of Veterans' Appeals or by the United States Court of Appeals for Veterans Claims for additional development or other appropriate action must be handled in an expeditious manner. See 38 U.S.C.A. §§ 5109B, 7112 (West Supp. 2013).

_____ K. PARAKKAL Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

Bd. Vet. App. 1420573, 2014 WL 3514795

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Bd. Vet. App. 1426912, 2014 WL 3959219

Board of Veterans Appeals

Department of Veterans' Affairs

[TITLE REDACTED BY AGENCY]

11-28 750
Decision Date: 06/13/14
Archive Date: 06/26/14

***1** On appeal from the Department of Veterans Affairs Regional Office in Columbia, South Carolina

THE ISSUE

Entitlement to an effective date earlier than January 8, 2010, for the award of service connection for posttraumatic stress disorder (PTSD).

REPRESENTATION

Veteran represented by:Disabled American Veterans
ATTORNEY FOR THE BOARD
A. Larson, Associate Counsel

INTRODUCTION

The Veteran had active service from October 1976 to August 1995.

This matter comes before the Board of Veterans' Appeals (Board) on appeal of a November 2010 rating action by the Department of Veterans Affairs (VA) Regional Office (RO) located in Columbia, South Carolina.

FINDINGS OF FACT

1. A June 2007 rating decision denied service connection for PTSD. The Veteran was notified of this decision and of his appellate rights by letter dated June 26, 2007. He did not appeal.

2. On January 8, 2010, the Veteran filed a petition to reopen his claim for service connection for PTSD.

CONCLUSION OF LAW

The criteria for the award of an effective date earlier than January 8, 2010 for the grant of service connection for PTSD have not been met. 38 U.S.C.A. §§ 5107, 5110, 7105 (West 2002); 38 C.F.R. §§ 3.156, 3.400 (2013).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

I. The Duty to Notify and Assist

Under the Veterans Claims Assistance Act (VCAA), when VA receives a complete or substantially complete application for benefits, it must notify the claimant of the information and evidence not of record that is necessary to substantiate a claim, which information and evidence VA will obtain, and which information and evidence the claimant is expected to provide. 38 C.F.R. § 3.159 (2013). Here, the Veteran was provide with the relevant notice and information a January 2010 letter prior to his original grant of service connection which contained a section regarding how the VA determines effective date. Pelegrini v. Principi, 18 Vet. App. 112, 120-21 (2004) (Pelegrini II). Following his grant of service connection and his subsequent Notice of Disagreement regarding the effective date of his award, the RO again sent him notice in a May 2011 letter that explained what the evidence must show for a grant of an earlier effective date. He has not alleged any notice deficiency during the adjudication of his claim. Shinseki v. Sanders, 129 S. Ct. 1696 (2009).

VA has also complied with its duty to assist the Veteran in gathering evidence to substantiate his claim. All service treatment records and pertinent VAMC treatment records are associated with the claims folder.

II. Earlier Effective Date

The Veteran alleges that his award of service connection for his PTSD should be granted an earlier effective date of January 2007, which represents the date he filed his original claim for service connection for the condition.

***2** Review of the claims file reveals that the Veteran was originally denied service connection for PTSD in June 2007. The RO determined that although the Veteran had a diagnosis of PTSD, there was no documentation that he had a confirmed stressful experience or event in service. He was notified of this decision and of his appellate rights by letter dated June 26, 2007. He did not appeal, and no new and material evidence was received within one year. Therefore, the June 2007 decision became final. 38 U.S.C.A. § 7105(b)(2)(c) (West 2002); 38 C.F.R. §§ 3.156(b), 3.160(d), 20.201, 20.302(a) (2013).

The Veteran filed a petition to reopen his claim for service connection for PTSD in January 2010. This petition was denied in an April 2010 RO rating decision. The Veteran submitted a timely notice of disagreement in July 2010. He was afforded a VA PTSD examination in November 2010. Thereafter, the RO granted service connection for PTSD in the November 2010 decision on appeal, assigning an effective date of January 8, 2010, the day he submitted his petition to reopen.

In general, where a claim for service connection is filed more than one year after separation from active service, the effective date for the grant of service connection is the date of receipt of claim, or the date entitlement arose, whichever is later. 38 U.S.C.A. § 5110(b) (West 2002 & Supp. 2013); 38 C.F.R. § 3.400(b) (2013). When a grant of service connection stems from a reopened claim based on submitted new and material evidence, the effective date will be the date of receipt of the new claim or date entitlement arose, whichever is later. 38 C.F.R. § 3.400(q), (r). The United States Court of Appeals for Veterans Claims (Court) has held that when a claim is reopened, the effective date cannot be earlier than the date of the claim to reopen. Juarez v. Peake, 21 Vet. App. 537, 539-40 (2008) (citing Bingham v. Nicholson, 421 F.3d 1346 (Fed. Cir. 2005); Leonard v. Nicholson, 405 F.3d 1333, 1337 (Fed. Cir. 2005); Flash v. Brown, 8 Vet. App. 332, 340 (1995).)

Thus, an effective date earlier than January 8, 2010 is not warranted. As stated above, the June 2007 rating decision was not appealed and became final. Thus, under 38 C.F.R. § 3.400, and as held by Juarez, the effective date for the Veteran's reopened service connection claim cannot be earlier than the date the Veteran filed: January 8, 2010. There is no evidence showing that the Veteran submitted a claim for service connection for PTSD at any time between June 26, 2007 and January 8, 2010.

In making this determination, the Board notes that in the November 2010 rating decision the RO stated that since the Veteran's claim was received in January 2010 VA had amended its rules for adjudicating claims for service connection for PTSD, and therefore he was scheduled for a VA examination with a medical opinion. The RO was referencing 38 C.F.R.

§ 3.304(f), which was amended to reduce the evidentiary burden of establishing a stressor for a PTSD claim when it is related to a fear of hostile military or terrorist activity. See 38 C.F.R. § 3.304(f); see generally Stressor Determinations for Posttraumatic Stress Disorder, Final Rule, 75 Fed. Reg. 39843 (July 13, 2010), codified at 38 C.F.R. § 3.304(f)(3). The Supplementary Information in the announcement of the Final Rule indicated that 'VA will not apply the rule to claims that were finally denied before the effective date of the rule unless new and material evidence is submitted,' and 'The change in the evidentiary standard for establishing occurrence of an in-service stressor would not constitute a basis on which to reopen a finally denied claim for service connection for PTSD because it is procedural in nature and does not effect a substantive change in the law governing service connection for disabilities.' 75 Fed. Reg. at 39851. Furthermore, VBA Training Letter 10-05 (July 16, 2010) provides: 'To reopen a claim under new § 3.304(f)(3), VA will accept a veteran's lay statement regarding an in-service stressor - 'fear of hostile military or terrorist activity' - as sufficient to constitute new and material evidence for the purpose of reopening a previously denied claim, if the veteran's record otherwise shows service in a location involving exposure to 'hostile military or terrorist activity.'

***3** In view of the above, although the new PTSD regulation liberalizes, in particular circumstances, the evidentiary standard for establishing an in-service stressor, it is not a liberalizing change for effective date purposes. 38 U.S.C.A. § 5110(g); 38 C.F.R. § 3.114(a); but see Ervin v. Shinseki, 24 Vet. App. 318 (2011). Rather, the appropriate effective date should be determined under the general rule for effective dates, as applied above. 38 U.S.C.A. § 5110(a); 38 C.F.R. § 3.400. Regardless, the Board points out that the January 8, 2010 effective date assigned by the RO predates the amendment to 38 C.F.R. § 3.304(f).

Therefore, the preponderance of the evidence is against the claim for an earlier effective date for the Veteran's service connected PTSD. With no doubt to be resolved in his favor, his claim must be denied.

ORDER

Entitlement to an effective date earlier than January 8, 2010, for the award of service connection for PTSD is denied.

_____ P.M. DILORENZO Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

Bd. Vet. App. 1426912, 2014 WL 3959219

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Bd. Vet. App. 1616879, 2016 WL 3161380

Board of Veterans Appeals

Department of Veterans' Affairs

[TITLE REDACTED BY AGENCY]

13-12 722
Decision Date: 04/27/16
Archive Date: 05/04/16

***1** On appeal from the Department of Veterans Affairs Regional Office in Seattle, Washington

THE ISSUE

Entitlement to an effective date earlier than October 8, 2009, for the grant of service connection for posttraumatic stress disorder (PTSD).

REPRESENTATION

Veteran represented by:Disabled American Veterans
ATTORNEY FOR THE BOARD
C. Smith, Associate Counsel

INTRODUCTION

The Veteran served on active duty in the U.S. Army from January 1964 until April 1968.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a March 2011 rating decision by the Department of Veterans Affairs (VA) Regional Office (RO) in Seattle, Washington that granted the Veteran's claim for service connection for PTSD effective October 6, 2010. In February 2013, the RO granted an earlier effective date of October 8, 2009; however, the Veteran seeks an earlier effective date of July 1, 1998, the date of his original claim. In a June 2015 decision, the Board denied entitlement to an effective date earlier than October 8, 2009 for service-connected PTSD. The Veteran appealed the Board's decision to the United States Court of Appeals for Veterans Claims (Court). In a January 2016 Order, the Court remanded the matter to the Board for development consistent with the parties' Joint Motion for Remand (Joint Motion). In relevant part, the Joint Motion instructed the Board that the date of the Veteran's original claim for service connection for PTSD was July 1, 1998.

This case consists entirely of documents in the Veterans Benefits Management System (VBMS). The Board has reviewed all relevant documents in VBMS. Any future consideration of this Veteran's case should take into consideration the existence of this electronic record. All documents in Virtual VA are duplicative of those in VBMS.

FINDINGS OF FACT

1. The Veteran's initial claim of entitlement to service connection for PTSD was received by VA on July 1, 1998.

2. New and relevant service personnel records were received in November 2009. These records existed at the time of prior denials in December 1998 and February 1999, and the RO had received sufficient information to identify and obtain the records on those earlier dates.

3. PTSD was first formally diagnosed at a February 16, 2011 VA examination, and assessed at that time as etiologically related to the Veteran's fear of hostile military activity while deployed to Vietnam.

CONCLUSION OF LAW

The criteria for an effective date earlier than October 8, 2009, for the grant of service connection for PTSD have not been met. 38 U.S.C.A. §§ 5101, 5110 (West 2014); 38 C.F.R. §§ 3.102, 3.156, 3.304(f), 3.400 (2015).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

Duties to Notify and Assist

Upon receipt of a substantially complete application for benefits, VA must notify the claimant of what information or evidence is needed in order to substantiate the claim, and it must assist the claimant by making reasonable efforts to get the evidence needed. 38 U.S.C.A. §§ 5103(a), 5103A (West 2014); 38 C.F.R. § 3.159(b) (2015); Quartuccio v. Principi, 16 Vet. App. 183, 187 (2002). The notice required must be provided to the claimant before the initial unfavorable decision on a claim for VA benefits, and it must (1) inform the claimant about the information and evidence not of record that is necessary to substantiate the claim; (2) inform the claimant about the information and evidence that VA will seek to provide; and (3) inform the claimant about the information and evidence the claimant is expected to provide. 38 U.S.C.A. § 5103(a); 38 C.F.R. § 3.159(b)(1); Pelegrini v. Principi, 18 Vet. App. 112, 120 (2004).

***2** In this case, the Veteran is challenging the effective date assigned for the grant of service connection. Where an underlying claim has been granted and there is disagreement as to 'downstream' questions, the claim has been substantiated, and there is no need to provide additional § 5103 notice, nor is there prejudice from absent notice. Hartman v. Nicholson, 483 F.3d 1311, 1314-15 (Fed. Cir. 2007); VAOPGCPREC 8-2003 (Dec. 22, 2003).

In addition, the duty to assist the Veteran has also been satisfied in this case. The Veteran's service treatment and personnel records, as well as all identified and available post-service medical records are in the claims file. The Veteran has not identified any available, outstanding records that are relevant to the claim decided herein. The Board acknowledges that at times the Veteran has referenced private mental health treatment for stress and bipolar disorder. In connection with his claim for service connection for PTSD, VA provided the Veteran with letters dated August 1998 and November 2009 that instructed him to identify any private treatment providers for the claimed condition, and those letters included the necessary Authorizations and Consent to Release Information. Despite multiple requests, the Veteran did not identify any private treatment providers who treated him for PTSD, nor did he provide any Authorizations and Consent to Release Information. The record includes written statements provided by the Veteran and his representative. In addition, the Veteran was afforded adequate VA examinations in connection with his service connection claim. For these reasons, the Board concludes that VA has fulfilled the duty to assist the Veteran in this case. Hence, there is no error or issue that precludes the Board from addressing the merits of this appeal.

Law and Analysis

The Veteran seeks an effective date of July 1, 1998 for his service connected PTSD, which in a February 2011 VA examination report was assessed as etiologically related to his fear of hostile military activity while deployed in Vietnam. Generally, the effective date of an award of disability compensation based on an original claim shall be the date of receipt of the claim or the date entitlement arose, whichever is later. 38 U.S.C.A. § 5110(a) (West 2014); 38 C.F.R. § 3.400 (2015).

In cases of reopened claims for service connection, the effective date is also the date of receipt of claim or date entitlement arose, whichever is later. 38 C.F.R. § 3.400(r) (2015).

When VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim. 38 C.F.R. § 3.156(c)(1) (2015). The service department records contemplated by the regulation include, in pertinent part, service records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the Veteran by name. 38 C.F.R. § 3.156(c)(1) (2015).

***3** As noted in the Board's June 2015 decision and the parties' Joint Motion granted in January 2016, new but previously existing and relevant service department records were received in November 2009, following the RO's October 1998 and February 1999 denials of the Veteran's claim of entitlement to service connection for PTSD. A March 2011 rating decision granted entitlement to service connection for PTSD, and that award was based in part on such records. Therefore, in this case the effective date is the date entitlement arose, or the date VA received the previously-denied claim, whichever is later. 38 C.F.R. § 3.156(c)(3) (2015). Accordingly, as the date of the previously-denied claim was July 1, 1998, the remaining question for the Board to resolve is the date the entitlement to service connection for PTSD due to fear of hostile military activity arose.

With regard to the date of entitlement, the term 'date entitlement arose' is not defined in the current statute or regulation. However, it is the date when the claimant met the requirements for the benefits sought, which is determined on a 'facts found' basis. 38 U.S.C.A. § 5110(a); McGrath v. Gober, 14 Vet. App. 28, 35 (2000). An effective date generally can be no earlier than the 'facts found.' DeLisio v. Shinseki, 25 Vet. App. 45 (2011). These 'facts found' include the date the disability first manifested and the date entitlement to benefits was authorized by law and regulation. See generally 38 C.F.R. § 3.400. For instance, if a claimant filed a claim for benefits for a disability before he actually had the disability, the effective date for benefits can be no earlier than the date the disability first manifested. Ellington v. Peake, 541 F.3d 1364, 1369-70 (Fed. Cir. 2008). However, the date entitlement arose is not the date that the RO receives the evidence, but the date to which that evidence refers. McGrath, 14 Vet. App. at 35.

Generally, service connection may be granted for a disability resulting from disease or injury incurred in or aggravated by service. 38 U.S.C.A. §§ 1110, 1131 (West 2014); 38 C.F.R. § 3.303 (2015). To establish entitlement to service connection for a claimed disorder, there must be (1) competent evidence of a current disability; (2) competent evidence of in-service incurrence or aggravation of a disease or injury; and (3) competent evidence of a nexus between the claimed in-service disease or injury and the current disability. See 38 C.F.R. § 3.303; Davidson v. Shinseki, 581 F.3d 1313, 1316 (Fed. Cir. 2009).

There are particular requirements for establishing service connection for PTSD that are distinct from those for establishing service connection generally. Arzio v. Shinseki, 602 F.3d 1343, 1347 (Fed. Cir. 2010). Service connection for PTSD requires medical evidence diagnosing 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).

***4** 38 C.F.R. § 4.125(a) mandates that all mental disorder diagnoses must conform to the American Psychiatric Association's Diagnostic and Statistical Manual for Mental Disorders, 4th ed. (DSM-IV). 38 C.F.R. § 3.304(f). According to the current criteria, a diagnosis of PTSD requires exposure to a traumatic event, or stressor. A stressor involves exposure to a traumatic event in which the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others, and the person's response involved intense fear, helplessness, or horror. The sufficiency of a stressor is a medical determination, and the occurrence of a claimed stressor is an adjudicatory determination. 38 C.F.R. § 3.304(f). The Board notes that the

DSM 5 is inapplicable to this claim. See Schedule for Rating Disabilities - Mental Diseases and Definition of Psychosis for Certain VA Purposes, 79 Fed. Reg. 45,093 (Aug. 4, 2014).

Effective July 13, 2010 the requirements for establishing the stressor criterion for a diagnosis of PTSD were amended. Under 38 C.F.R. § 3.304(f)(3), if a stressor claimed by a Veteran is related to the Veteran's fear of hostile military or terrorist activity, and a VA psychiatrist or psychologist or a psychiatrist or psychologist with whom VA has contracted confirms that the claimed stressor is adequate to support a diagnosis of PTSD, and that the Veteran's symptoms are related to the claimed stressor; in the absence of clear and convincing evidence to the contrary, and provided the claimed stressor is consistent with the places, types, and circumstances of the Veteran's service, the Veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.

With regard to effective dates, if a claim is reviewed within one year from the effective date of a liberalizing law on a VA issue, benefits may be authorized from the effective date of a liberalizing law or VA issue. 38 U.S.C.A. § 5110(g); 38 C.F.R. §§ 3.114, 3.400(p). The amendments to 38 C.F.R. § 3.304(f)(3), however, are not to be considered a liberalizing law under 38 C.F.R. § 3.114 (2015). See Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed. Reg. 39843-01, 39851 (July 13, 2010). As 38 C.F.R. § 3.304(f)(3) governs procedural matters rather than creates a new basis for entitlement to service connection for PTSD, it merely relaxes under certain circumstances the evidentiary standard for establishing occurrence of a stressor. See Stressor Determinations, 75 Fed. Reg. 39843-01. As a result, 38 U.S.C.A. 5110(a), rather than 38 U.S.C.A. 5110(g) is applicable to awards under this rule. Thus, the effective date of benefits awarded pursuant to 38 C.F.R. § 3.304(f)(3) will be assigned in accordance with the facts found, but will not be earlier than the date of claim. 38 U.S.C.A. § 5110(a).

As explained below, the Board finds that based on the facts of this case, entitlement to service-connection for PTSD did not arise prior to the currently assigned effective date of October 8, 2009.

***5** The Veteran initially filed his claim for service connection for PTSD on July 1, 1998. The Veteran was first afforded a VA PTSD examination in January 1999. At that time the Veteran reported that in July 1966 he was sent to Vietnam and was located near Saigon and Bien Hoa doing food inspections. He reported that from 1994 to 1996 he saw a Dr. Walker because of unspecified stress with which he was dealing. Upon examination, the examiner diagnosed Axis I alcohol abuse, and Axis II personality disorder with suspicious and obsessive characteristics. The examiner stated that they reviewed 'the particulars for posttraumatic stress disorder' and did not 'see any particulars there.'

The Veteran was afforded a VA social industry survey for mental disorders in January 1999. At that time the Veteran reported that he served as a food service inspector in Vietnam. He reported that he was not exposed to direct combat, but was on occasion near areas that were being mortared. The Veteran was also exposed to the dead when 'dealing caskets.' The Veteran reported that in service he learned to always be on guard and prepared for attacks from places one did not expect. The Veteran denied any specific trauma, intrusive recollections, or other symptomatology related to his period of active service.

In April 2008 the Veteran presented to the American Lake VA Medical Center (VAMC) seeking mental health treatment. At that time, the Veteran reported seeing mental health providers at Group Health since 1998 for bipolar disorder and substance abuse. With regard to his service, the Veteran reported that while in Vietnam he experienced being fired upon, witnessing buildings being blown up, and people dying. He reported experiencing dreams about the in-service events in the past, but noted that he had not had any in several years. He further reported being easily startled. The Veteran was assessed as endorsing avoidance of discussing military experiences. Upon examination, the examiner diagnosed alcohol and cannabis abuse, early full remission, rule out bipolar disorder, not otherwise specified, and rule out PTSD. The examiner noted that diagnostically, it was difficult to determine the Veteran's history of bipolar disorder given extensive history of alcohol and substance abuse. The examiner further noted that the Veteran reported potential symptoms of PTSD, however, there was not enough information available to determine if the diagnosis was active. While the Veteran

endorsed experiencing traumatic events, he did not quite meet the threshold for a current diagnosis with the information provided. A PTSD screen performed at that time was negative.

In a November 2008 VA psychiatry note, it was reported that the Veteran continued to experience recurrent nightmares, irritability, and easy startle response that he attributed, for the first time, to his direct combat experience in Vietnam. At that time it was noted that the Veteran had diagnoses of mood disorder, not otherwise specified, and alcohol and cannabis dependence in sustained partial remission.

***6** At a December 2008 VA psychiatry intake evaluation, the diagnoses were provisional PTSD according to the DSM IV criteria and polysubstance abuse in full remission. These diagnoses were made by a licensed clinical social worker. At that time, no reference was made to the Veteran's military service. The social worker stated that the Veteran's primary problem to be treated was lack of knowledge of techniques to manage symptoms of PTSD. The social worker also indicated that the Veteran had unresolved trauma, but did not indicate to what the trauma was related.

In a March 2009 VA primary care note, PTSD was listed as one of the Veteran's active problems.

In an October 2009 statement, the Veteran reported that he had been diagnosed with PTSD by a counselor at the American Lake VA Medical Center in Washington State. A review of the record indicates that the Veteran was referring to the December 2008 VA psychiatry intake evaluation.

In October 2010, the Veteran filed a claim to reopen his previously denied claim of entitlement to service connection for PTSD. At that time the Veteran reported that while stationed at an Air Force base in Vietnam from November 1966 through January 1967, the base came under enemy fire and he feared for his life. He also reported that from March 1967 through July 1967, the naval craft he was aboard came under fire on the Saigon River and he was almost killed.

The Veteran was afforded a VA PTSD examination on February 16, 2011. At that time, the Veteran reported that since Vietnam, he would have panic attacks, was startled by loud noises, and was unable to sleep well. He reported having nightmares of being shot at in Vietnam, and that he recently had a flashback while watching a war related movie. He denied current symptoms of hypervigilance, or recent panic attacks. With regard to his in-service stressors, the Veteran reported that while stationed in Vietnam, his unit came under attack by enemy mortar rounds and gunfire. He stated that his job was to inspect containers of food, and that he felt exposed because there was insufficient security such that he feared he could be killed or wounded any time. He also reported seeing buildings blown up, and people who had been killed or wounded. He reported that he felt intense fear and helplessness that he could be killed in the line of duty. Upon examination, the examiner diagnosed PTSD according to the DSM-IV criteria, and alcohol and cannabis abuse in remission. The examiner indicated that the multiple Axis I diagnoses were a progression of the Veteran's PTSD diagnosis, as he would use alcohol and cannabis to diminish the emotional symptoms of this PTSD. The examiner opined that the Veteran's PTSD was directly related to his fear of hostile military activity while deployed to Vietnam.

Based on the foregoing, the Board finds that the earliest competent diagnosis of PTSD with a corresponding competent nexus opinion was February 16, 2011, the date of the VA PTSD examination that first diagnosed PTSD related to fear of hostile military activity. The February 2011 PTSD diagnosis and nexus opinion were the first such diagnosis and opinion that fully complied with the requirements of 38 C.F.R. § 3.304(f) governing the specific considerations for PTSD service connection. That is, therefore, the date the entitlement arose.

***7** The Board acknowledges that the Veteran was given a provisional diagnosis of PTSD at the December 2008 VA psychiatry intake evaluation. A provisional diagnosis is not a diagnosis that meets the requirements for service connection. In addition, at that time, the diagnosing examiner did not provide any nexus opinion, nor any statement that could reasonably be construed by the Board as a nexus opinion. Therefore, the December 2008 provisional PTSD diagnosis is insufficient to support entitlement to service connection for PTSD.

The Board also acknowledges that at times the Veteran has referenced private mental health treatment. In his October 2009 statement, however, the Veteran reported being diagnosed with PTSD in December 2008, which refers to the provisional diagnosis. In addition, despite VA's repeated requests for additional information regarding private treatment records, to date the Veteran has not provided the requested information necessary for the RO to obtain those private treatment records. As such, there is nothing in the record to indicate that the Veteran had a competent diagnosis of PTSD with a corresponding competent nexus opinion prior to February 16, 2011 to support a claim of entitlement to service connection for PTSD.

Accordingly, the Board finds that entitlement to service connection for PTSD did not arise until February 26, 2011, the date of the first competent PTSD diagnosis and nexus opinion. Thus, the date the entitlement arose came after the July 1, 1998 date of claim, therefore under 38 U.S.C.A. § 5110(a), July 1, 1998 cannot be the appropriate effective date. The RO has already granted an earlier effective date of October 8, 2009, which predates the February 26, 2011 VA PTSD examination. Therefore, based on the facts of this case, entitlement to an effective date earlier than October 8, 2009 is not warranted. 38 U.S.C.A. §§ 5110; 38 C.F.R. §§ 3.102, 3.304(f), 3.400. As the evidence preponderates against the claim, there is no reasonable doubt to be resolved. Gilbert v. Derwinski, 1 Vet. App. 49, 53 (1990).

ORDER

Entitlement to an effective date earlier than October 8, 2009 is denied.

_____ K. MILLIKAN Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

Bd. Vet. App. 1616879, 2016 WL 3161380

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Bd. Vet. App. 1629772, 2016 WL 4654941

Board of Veterans Appeals

Department of Veterans' Affairs

[TITLE REDACTED BY AGENCY]

14-03 337
Decision Date: 07/26/16
Archive Date: 08/04/16

***1** On appeal from the Department of Veterans Affairs Regional Office in Jackson, Mississippi

THE ISSUES

1. Entitlement to an effective date prior to January 6, 2010 for the grant of service connection for posttraumatic stress disorder (PTSD).

2. Entitlement to an effective date prior to September 26, 2012 for grant of total disability based on individual unemployability due to service-connected disability (TDIU). 3. Entitlement to service connection for tinnitus.

REPRESENTATION

Appellant represented by:Disabled American Veterans
WITNESS AT HEARINGS ON APPEAL
The Veteran
ATTORNEY FOR THE BOARD
Jason A. Lyons, Counsel

INTRODUCTION

The Veteran served on active duty from August 1968 to August 1970, and from February 1971 to November 1972.

This case is before the Department of Veterans Affairs (VA) Board of Veterans Appeals (Board) from May 2011, August 2012 and December 2013 rating decisions of the VA Regional Office (RO) in Jackson, Mississippi. An April 2013 hearing was held before a Decision Review Officer (DRO) at the RO. Then as directed by September 2015 Board remand, the Veteran was provided an April 2016 Travel Board hearing.

The Veteran most recently updated the status of legal representation in this matter to the Veterans Service Organization (VSO) denoted on the title page above.

The Board herein decides the issues of an earlier effective date for grant of service connection for PTSD and service connection for tinnitus, and the remaining issue of earlier effective date for TDIU is addressed in the

REMAND

portion of the decision below and

REMAND

D to the Agency of Original Jurisdiction (AOJ).

FINDINGS OF FACT

1. Following a Board June 2003 decision denying the Veteran's original claim for entitlement to service connection for PTSD, and July 2005 RO rating decision denying petition to reopen the same, a claim to reopen was received on January 6, 2010.

2. There is no earlier pending or unadjudicated claim for service connection for PTSD than the aforementioned January 6, 2010 petition to reopen.

3. Notwithstanding argumentation raised by the Veteran and representative for application of 38 C.F.R. § 3.156(c), no additional service department records were obtained since 2003 that led to the ultimately favorable outcome in this case, as to otherwise remove the finality of the Board's June 2003 decision.

4. There is sufficient basis from the Veteran's competent lay testimony, in and of itself, essentially consistent with circumstances of excessive in-service noise exposure, as to determine that in all reasonable likelihood the Veteran presently has tinnitus that was incurred in, and/or consistent with, active military service.

CONCLUSIONS OF LAW

1. The criteria are not met to establish an earlier effective date than January 6, 2010 for the grant of service connection for PTSD. 38 U.S.C.A. §§ 1110, 5103, 5103A, 5107(b), 5110 (West 2014); 38 C.F.R. §§ 3.102, 3.159, 3.303, 3.304(f), 3.400 (2015).

***2** 2. Resolving reasonable doubt in the Veteran's favor, the criteria are met to establish service connection for tinnitus. 38 U.S.C.A. §§ 1110, 5103, 5103A, 5107(b), 5110 (West 2014); 38 C.F.R. §§ 3.102, 3.159, 3.303, 3.307, 3.309 (2015).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

VA's Duty to Notify and Assist the Veteran

The Veterans Claims Assistance Act of 2000 (VCAA), codified at 38 U.S.C.A. §§ 5100, 5102, 5103A, 5107, 5126 (West 2014) sets forth VA's duties to notify and assist a claimant with the evidentiary development of a claim for compensation or other benefits. See also 38 C.F.R. §§ 3.102, 3.159 and 3.326 (2015). VCAA notice must, upon receipt of a complete or substantially complete application for benefits, inform the claimant of any information and evidence not of record (1) that is necessary to substantiate the claim; (2) that the claimant is expected to provide; and (3) that VA will obtain on his behalf.

As regarding the Board's grant herein of the claim of entitlement to service connection for tinnitus, those criteria being effectively met, the VCAA is inapposite and discussion of it, in relation to the matter, is rendered moot.

However, the Board also decides an earlier effective date claim here. The Veteran has been provided satisfactory and timely VCAA notice regarding the claim of earlier effective date for PTSD, from August 2011 RO correspondence. Strictly speaking, the dictates of the VCAA notice requirement do not apply anyway. Where a claim for service connection has been substantiated and an initial rating and effective date assigned, the filing of a Notice of Disagreement

with the RO's decision as to the assigned effective date does not require additional 38 U.S.C.A. § 5103(a) notice, absent assertion otherwise by the claimant of prejudicial impact from defective VCAA notice with respect to that 'downstream element.' See Goodwin v. Peake, 22 Vet. App. 128, 137 (2008). See also Dunlap v. Nicholson, 21 Vet. App. 112, 119 (2007). Here, however, in interest of thoroughness the Veteran did receive the August 2011 claim specific notice on the issue of earlier effective date.

Moreover, VA's duty to assist has been fulfilled in this instance. Given that the benefit sought is that of an earlier effective date for compensation for PTSD as a disability already adjudicated service-connected, most if not all of the relevant evidence and information originates from documentation already of record. The Veteran's arguments in favor of earlier effective date, indeed, are more so legal in nature and draw upon existing facts already known. Still, more recent VA outpatient treatment records have been obtained, and the Veteran underwent VA Compensation and Pension examination. The Veteran himself has provided further income history records from the Social Security Administration (SSA), and this along with copy of a July 2013 private psychological evaluation. As indicated, the Veteran testified at a hearing before RO personnel. An April 2016 Travel Board hearing was later held, during which the Veteran presented testimony and received proper assistance in developing his claim. See Bryant v. Shinseki, 23 Vet. App. 488 (2010). There is no indication of further development to complete or relevant evidence to obtain. The Board has a sufficient basis upon which to issue a decision.

***3** I. Service Connection for Tinnitus

Under applicable law, service connection is available for current disability resulting from disease contracted or an injury sustained while on active duty service. 38 U.S.C.A. § 1110; 38 C.F.R. § 3.303(a). Service connection also may be granted for disease diagnosed after discharge where incurred in service. 38 C.F.R. § 3.303(d) .

Establishing service connection generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) an in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability. See Davidson v. Shinseki, 581 F.3d 1313 (Fed. Cir. 2009); Hickson v. West, 12 Vet.App. 247, 253 (1999).

If there was chronic disease in service, reappearance at any later date is service-connected, unless clearly due to an intercurrent cause. If not chronic, there must be continuity of symptomatology to link in-service disability to post-service condition. See 38 C.F.R. § 3.303(b). But see Walker v. Shinseki, 708 F.3d 1331 (Fed. Cir. 2013) (continuity of symptomatology principle limited to where involve those diseases already listed as 'chronic' under 38 C.F.R. § 3.309(a)). Certain chronic conditions, such an organic disease of the nervous system, may be presumed to have been directly incurred in active service without need for competent evidence proving a causal relationship to service, if manifested to a 10 percent level within one-year of service discharge. 38 U.S.C.A. §§ 1101, 1112, 1113, 1137; 38 C.F.R. §§ 3.307, 3.309.

The determination as to whether the requirements for service connection are met is based on an analysis of all the relevant evidence of record, medical and lay, and the evaluation of its competency and credibility to determine its ultimate probative value in relation to other evidence. See Baldwin v. West, 13 Vet. App. 1, 8 (1999).

Moreover, under VA law, 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. See 38 C.F.R. § 3.102. See, too, Gilbert v. Derwinski, 1 Vet. App. 49, 53 (1990).

The Board has duly considered this claim, and when implementing relevant law and provisions, this inclusive of VA's benefit-of-the-doubt doctrine, will decide to award entitlement to service connection for tinnitus. Along these lines, the Board takes note of the Veteran's April 2016 hearing testimony (hearing transcript, t. 11-12), wherein the Veteran said that he first experienced the relevant problem when he was about seven weeks into basic training and on the infiltration

course. He recalled being down crawling and unable to pick himself up because of machine gun fire overhead, and recalled further that when he passed certain areas they would detonate explosions. At one point, further recalled, is that he was a little too close to the pit when an explosion went off, and for maybe three or four days he could not hear anything. He then kept telling the Drill Sergeant he was having problems with his ears, but did not receive much assistance, and to his understanding going to sick call would mean achieving a lesser rating in service. Finally, the Veteran received an in-service audiological evaluation in 1972 with a variety of tests, all done at Fort Sam Houston, and the Veteran informed the military evaluators that his ears had not stopped ringing since the charge went off in 1968. To the Veteran's recollection he was told that this problem originated from all the loud noise and guns from having served in Vietnam. Finally, at the hearing, the Veteran clarified (on questioning from his representative) that according to the doctor at Fort Sam Houston, the condition of tinnitus was not only related to his military service as far as combat service, he also related it to the incident while in boot camp. [Parenthetically, though, and as noted in somewhat more detail in subsequent discussion of other claims, the Veteran did not specifically have participation in combat during service. Nevertheless, he obviously can describe events of bootcamp.]

***4** Review of Service Treatment Records (STRs) indicates, in May 1972 the Veteran presented to an ENT (ear/nose/throat) clinic at Fort Polk, Louisiana, with a flat sensorineural hearing loss since May 1970. The military audiologist then noted that because of inconsistency in testing that treatment provider was unable to evaluated the Veteran's hearing. The provisional diagnosis was inconsistent responses. Thereafter, July 1972 in-service audiology response (it is unclear what military base or facility processed this) was in pertinent part, of inconsistent audiograms; results not consistent with a severe hearing loss; behavioral responses inconsistent with audiometric picture. The recommendation, was that the Veteran should not be considered for Medical Board on hearing until further evaluation was completed; further evaluation was needed; and the Veteran needed a consultation with the psychiatry department.

Then on October 1972 evaluation from the ENT clinic, Fort Polk, the conclusion stated was that administrative evaluation at Fort Sam Houston not consistent with severe hearing loss, and a psychiatry evaluation was needed. Reevaluated at Fort Polk in November 1972, the Veteran was found to apparently have a severe hearing loss, though the audiologist felt his responses were inconsistent and his actual hearing may not be that severe. The Veteran was then put on a H-3 physical profile for bilateral sensorineural hearing loss, and it appears, received underwent Medical Board proceedings.

The Veteran had occasion to undergo VA Compensation and Pension examination twice. On the first examination, September 2010, the Veteran reported military noise exposure from cannon fire, gunfire, rockets, mortar and helicopters. Tinnitus was reportedly constant and began while he was in Vietnam. However, the VA examiner could not determine etiology of tinnitus without resorting to mere speculation -- presumably, this was because the Veteran's audiometric test results were not reliable, in that the voluntary pure tone thresholds appeared to be considerably exaggerated.

On May 2011 examination, a very similar opinion was forthcoming that the VA audiologist could not ascertain etiology of tinnitus without resort to speculation, again, with unreliable recent audiometric results and, ostensibly, because of the Veteran's ‘inability to give date of onset of tinnitus.‘

Having reviewed the foregoing, the Board is mindful that the Veteran had competent noise exposure, with no contravening evidence that he damaged his ears in a material sense during his reported basic training exercise. Moreover, he served in Vietnam and probably had significant noise exposure there including, per his report. His account is presumed competent, with no reason, as here, to doubt credibility. See generally, Buchanan v. Nicolson, 451 F.3d 1331 (Fed. Cir. 2006). There was clearly disagreement by in-service audiologists about what exactly was going on, inconsistent audiograms included. But that does not controvert noise exposure, or likelihood of the same, and with hearing protection too being absent.

***5** Next, the Veteran obviously competently reports tinnitus now. Finally, there is the matter of the Veteran competently reporting tinnitus in service, in the intervening years since, and now. As mentioned, tinnitus is a 'chronic' disease under VA regulations. By his competent testimony, causation is fairly established. The Board is not without review of prior VA medical opinions. All the same, the Board is not persuaded by the examiners' findings, implied, that lack of a reliable audiogram, in and of itself, frustrates reaching diagnosis of the condition of tinnitus. See Jones v. Shinseki, 23 Vet. App. 382, 290 (2010) (before relying on an examiner's conclusion that an etiology opinion would be speculative, the examiner must explain the basis for such an opinion or the basis must otherwise be apparent in the review of the evidence). The Veteran's testimony is duly accepted, to establish the very essential element of causation.

Accordingly, on these grounds, the Board will award service connection for tinnitus.

II. Earlier Effective date for Service Connection for PTSD

Applicable Law and Regulations

Under VA law, the effective date of an award of compensation benefits that is based on an original claim will be the date the claim was received or the date entitlement arose, whichever is later. See 38 U.S.C.A. § 5110; 38 C.F.R. § 3.400.

For original claims for service connection, the effective date can be the day following separation from active service if the claim is received within one year after separation from service; otherwise, the rule is the date of receipt of claim, or date entitlement arose, whichever is later. See 38 C.F.R. § 3.400(b)(2)(i).

For claims reopened based on receipt of new and material evidence, the effective date will be the date of receipt of claim or date entitlement arose, whichever is later. See 38 C.F.R. § 3.400(q)(2).

The date of claim is determined by the date it was received by VA. See 38 C.F.R. § 3.1(r). For purpose of this case (before new regulations effective March 24, 2015), the law readily allowed filing of informal claims. A 'claim' was defined broadly to include a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement to a benefit. 38 C.F.R. § 3.1(p) (2014). Any communication indicating intent to apply for a VA benefit might be considered an informal claim provided it identified the benefit sought. 38 C.F.R. § 3.155(a). See also, Criswell v. Nicholson, 20 Vet. App. 501 (2006); MacPhee v. Nicholson, 459 F.3d 1323, 1326-27 (Fed. Cir. 2006) (holding that the plain language of the regulations requires a claimant to have an intent to file a claim for VA benefits).

Under applicable law, there are specific additional VA criteria to establish service connection for PTSD: (1) medical evidence diagnosing PTSD; (2) credible supporting evidence that the claimed in-service stressor actually occurred; and (3) medical evidence of a link between current symptomatology and the claimed in-service stressor. 38 C.F.R. § 3.304(f).

***6** A diagnosis of PTSD must be established in accordance with 38 C.F.R. § 4.125(a), which provides that all psychiatric diagnoses must conform to the fourth edition of the American Psychiatric Association's Diagnostic and Statistical Manual for Mental Disorders (DSM-V). 38 C.F.R. § 3.304(f) .

The requirement of an in-service stressor is established by the veteran's testimony alone if he is shown to have engaged in combat with the enemy. See 38 U.S.C.A. § 1154(b); 38 C.F.R. § 3.304(d); Dizoglio v. Brown, 9 Vet. App. 163, 164 (1996). If VA determines the veteran engaged in combat with the enemy and his alleged stressor is combat-related, then his lay testimony or statement is accepted as conclusive evidence of the stressor's occurrence and no further development or corroborative evidence is required provided that such testimony is found to be 'satisfactory,' i.e., credible, and 'consistent with the circumstances, conditions, or hardships of service.' See 38 U.S.C.A. § 1154(b); 38 C.F.R. § 3.304(d); Zarycki v. Brown, 6 Vet. App. 91, 98 (1993).

For an in-service stressor not related to participation in combat, independent corroboration by outside evidence is required beyond the veteran's lay testimony alone. The record must contain credible supporting information from an independent source that corroborates his testimony or statements, such as service records. See Cohen v. Brown, 10 Vet. App. 128, 146-47 (1997). See also Moreau v. Brown, 9 Vet. App. 389, 394-95 (1996).

Apart from the above provisions, VA revised the regulation governing adjudication of claims for service connection for PTSD, effective July 13, 2010. See 75 Fed. Reg. 39,843, later codified at 38 C.F.R. § 3.304(f)(3). The new regulation eases the requirement that there be objective corroboration of a claimed in-service stressor. Under the new standard, if a stressor claimed by a veteran is related to the veteran's fear of hostile military or terrorist activity and a VA psychiatrist or psychologist confirms that the claimed stressor is adequate to support a diagnosis of PTSD and that the veteran's symptoms are related to the claimed stressor, provided the claimed stressor is consistent with the places, types, and circumstances of the veteran's service, the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor. Merits of the Claim

The Board has reviewed this claim for earlier effective date than January 6, 2010 for service connection for PTSD in accordance with the requirements of the law, and finds that applying these relevant provisions, such an earlier effective date is not assignable.

In so finding, at the outset, the law on effective dates is for application. While true that the Veteran filed an original claim much earlier than 2010 for service-connected compensation, by October 1993 RO rating decision that claim was denied. On appeal, a Board decision of June 2003 denied the claim. In that issuance, the Board's reasoning was that the Veteran simply did not have a clinical diagnosis of PTSD, the syndrome ruled out by February 2003 VA psychiatric examination. The Board had clearly accepted the veracity of the Veteran's identified in-service stressor that his unit in Vietnam came under mortar attack several times, yet, without a diagnosis of the very condition claimed could not grant service connection. The Board's decision was not appealed to the U.S. Court of Appeals for Veterans Claims (Court). It became final on the merits. See 38 U.S.C.A. § 7104 (West 2014); 38 C.F.R. §§ 3.104(a), 20.1100 (2015).

***7** After the Veteran filed an April 2005 petition to reopen the matter, it was denied by July 2005 RO rating decision, again for reason of lack of PTSD diagnosed. The Veteran did not appeal therefrom or submit new and material evidence within one year, rendering the July 2005 RO determination a final one. See 38 U.S.C.A. § 7105(c).

In January 2010, the Veteran filed another petition to reopen. On this more recent attempt a January 2011 RO rating decision reopened and granted the claim, with a 50 percent evaluation assigned effective January 6, 2010. Ostensibly, the claim was reopened under the then-new regulation relaxing the proof requirement for a stressor where due to hostile military activity. See generally, 38 C.F.R. § 3.304(f)(3). Given moreover that October 2010 VA examination linked a now confirmed diagnosis of PTSD with the stressor of witnessing rocket and mortar attacks, the underlying benefit sought of service connection was granted as well. The assigned effective date of service connection of January 6, 2010 directly reflected the date of receipt of the Veteran's petition to reopen the matter.

Therefore, prior to addressing the Veteran's contentions on the merits in this case, and strictly construing the law on effective dates applied to this case, January 6, 2010 as the most recent petition to reopen is the current assigned effective date and starting point of the analysis. See 38 C.F.R. § 3.400(q)(2).

The Board is also well aware that for purposes of assignment of an effective date, if a claim is reviewed within one year from the effective date of a liberalizing law on a VA issue, benefits may be authorized from the effective date of a liberalizing law or VA issue. 38 U.S.C.A. § 5110(g); 38 C.F.R. §§ 3.114, 3.400(p). Whereas the VA regulations relaxing the requirements for stressor corroboration were issued July 2010, these amendments to 38 C.F.R. § 3.304(f)(3) are not to be considered a liberalizing law for said purposes. See 75 Fed. Reg. 39843 -01, 39851 (July 13, 2010). In any event, the Veteran already has an effective date preceding this by six months.

In furtherance of this claim the Veteran has raised a series of arguments that warrant scrutiny. One point raised consistently at the Board hearing is that substantively and medically speaking, the Veteran maintains he has had the condition of PTSD at least since 1991 when he first filed a claim for compensation benefits for that same condition, and though he recalled some evaluating treatment providers were not convinced that PTSD was what the Veteran manifested, he had indeed been given psychotropic medication for that same condition back in 1991. (Board hearing transcript, t. 3-4). Along these lines, the Veteran recalled a one-month period of psychiatric treatment at the Jackson, Mississippi VA Medical Center (VAMC) during 1991, and noted he was originally discharged from service for difficulty getting along with others which he believed was a precursor to later psychiatric difficulties. A second argument raised by the Veteran at the Board hearing (t. 5) was that in his view there was evidence supporting his original claim for service connection for PTSD, namely that supporting an identified stressor, but that VA had taken the evidence out of the record early in the process and left him to exhaust all of his appeals to his detriment.

***8** Another argument comes into focus through communication from the Veteran's prior legal representative, in accordance with 38 C.F.R. § 3.156(c), when VA will reconsider a denial in light of receipt new service department records. The representative's January 2013 memorandum contends: the Veteran first filed for service connection for PTSD in 1991 reporting a stressor of mortar fire while at Nha Trang in Vietnam in 1970. An October 1993 RO rating decision denied his claim because the stressor could not be verified. On appeal, upon Board remand, February 2003 records inquiry confirmed that the 459th Signal Battalion in Nha Trang sustained mortar fire on several occasions in 1970. The Board's June 2003 decision denied the claim for no diagnosis of PTSD. Later, in 2010, new Form DD-214s were added to the record. Further, according to the instant argumentation, the January 2011 RO rating decision reopened and granted service connection because the Veteran had engaged in combat which verified his stressors. According to the representative, because the January 2011 rating decision granted service connection from review of service records added in 2003 and 2010, after original denial in 1993, section 38 C.F.R. § 3.159(c) applied and the proper effective date of service connection should be from the original claim in April 1991. The point made was that the Veteran's claim was finally granted January 2011 based upon the same stressors that had been always alleged since 1991, and so because of the service department records received in the interim and applying section 3.156(c), the claim should date back retroactively to 1991.

For reference, under 38 C.F.R. § 3.156(c), at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim. See 38 C.F.R. § 3.156(c)(1).

Moreover, an award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later, or such other date as may be authorized by the provisions of this part applicable to the previously decided claim. See 38 C.F.R. § 3.156(c)(3).

Addressing these contentions, to begin with the Board's understands the Veteran alleges, has supporting evidence of, and indeed may well have had the condition of PTSD continuously since 1991, perhaps even earlier since service. Some of his treatment providers diagnosed PTSD as early as then. A July 2013 private psychological evaluation report since then similarly states it was felt ‘more likely than not that [the Veteran's] PTSD began when he was in the military for the years noted above and has persisted to the present time.‘ (Report of Dr. J.E.M., p.8). See generally, Young v. McDonald, 766 F.3d 1348, 1352 (Fed. Cir. 2014) (indicating that having a medical diagnosis of PTSD is a condition precedent to establishing ‘date entitlement arose‘ to service connection for PTSD). For purposes of this case, however, the law governing effective dates is clear. Besides factual entitlement, there must be an earlier date of claim to assign an earlier effective date. Entitlement can be no earlier than the effective date of claim for service connection, and if service connection was previously and finally denied, the effective date of petition to reopen. See 38 C.F.R. § 3.400(q)(2).

***9** Notwithstanding the medical history in this case, the Board must adhere to the law on effective dates. See 38 U.S.C.A. § 7104(c). Here, the claim was originally considered and denied by the Board in June 2003 based on conclusion that the best evidence at that time (with essentially, contrary medical conclusions proffered) weighed against a diagnosis of PTSD. The first petition to reopen the same was denied July 2005. Nor is there an earlier communication than January 6, 2010 that represents a pending or unadjudicated claim. Barring some challenge to the inherent finality of the earlier June 2003 Board decision (or July 2005 RO decision on reopening attempt), the January 6, 2010 (second) petition to reopen service connection constitutes the operative date of claim, and no earlier. Substantive entitlement however compelling on grounds of equity, unfortunately, cannot get around the literal application of denoting a filing date of a claim.

A second assertion raised was that VA had taken the evidence out of the record early in the process, leaving the Veteran to exhaust all of his appeals to his detriment. There is no reason to believe this is the case, based on what can be ascertained from the claims file. Particularly, there is no patently obvious instance or example of evidence that was missing from the claims file back when the Board decided and denied the Veteran's claim in June 2003.

It warrants mention, as well, the Veteran does not raise a theory of Clear and Unmistakable Error (CUE) in any prior Board or RO adjudicative determination. One available ground for alleging CUE, which is itself defined as a very specific and rare kind of error, happens to be that the correct facts as known at the time were not before the adjudicator (that is, more than simple disagreement as to how the facts were weighed and evaluated). See Damrel v. Brown, 6 Vet. App. 242, 245 (1994). See, too, Fugo v. Brown, 6 Vet. App. 40, 43-44 (1993). This has not been specifically alleged through pleading CUE.

The Board now turns to the final grounds for recovery that were raised by the Veteran and prior representative, that of application of section 3.156(c) for reconsideration of a prior decision on receipt of additional service department records. It is alleged that new service department records were part of the reason service connection was awarded January 2011, even if other factors were also at play (i.e., a verified PTSD diagnosis). This interpretation of this history of the case is not borne out by the record. Rather, no pertinent new service department records were obtained since the June 2003 Board denial of the Veteran's original claim. The Board's June 2003 decision thus cannot be reconsidered de novo under section 3.156(c). While technically true, that back in October 1993 an RO rating decision failed to verify the Veteran's alleged stressor in support of PTSD, this October 1993 RO rating decision can no longer be independently challenged because it was appealed to the Board, and therefore subsumed by June 2003 Board decision. See 38 C.F.R. § 20.1104. Meanwhile, all additional service records developed pursuant to the Board's 1996 remand, including from USASCRUR (which formerly investigated incidents from official unit) were later duly and properly considered by the Board in its June 2003 decision. This decision, moreover, finally decided the Veteran's original claim. Consequently, the Board's June 2003 decision afforded a full and fair opportunity to review the Veteran's claim pending since 1991 in light of all service records (and again, notwithstanding what the RO determined back in 1993), not withholding any evidence. Nothing follows since 2003 in the way of additional service department records, or for that matter since the 2005 denied petition to reopen. In sum, no new service department records have been acquired such that the finality of any prior adjudication is vitiated pursuant to section 3.156(c).

***10** (Parenthetically, the Veteran's prior representative indicated that apparently new copies of Form DD-214, Report of Separation from Service were obtained in 2010. The Board cannot definitively rule this out from observation of the claims file in format of Veterans Benefits Management System (VBMS) electronic claims folder; but nonetheless, there simply is no indication that said copies of forms contributed anything further to knowledge of the Veteran's case, and/or added information to the DD-214 already on file. This is particularly true as the Veteran's relevant unit designation was clearly already well-known, as had permitted the 2003 USASCRUR unit history inquiry in the first place.)

Accordingly, in light of what the record objectively shows and reviewing all pertinent assertions and argumentation in this matter at hand, there are not tenable grounds to award an earlier effective date of service connection for PTSD. No earlier date is assignable than the January 6, 2010 petition to reopen, under these circumstances. The preponderance of

the competent evidence being unfavorable, this claim, VA's benefit-of-the-doubt doctrine held not applicable where the evidence on the whole weighs against a claim.

ORDER

Service connection for tinnitus is granted.

The claim for an effective date prior to January 6, 2010 for the grant of service connection for PTSD is denied.

REMAND

As indicated, herein the Board has granted service connection for tinnitus, which obviously impacts the Veteran's TDIU claim, regarding unemployability in light of service-connected disability. Technically speaking still, however, following the grant of service connection for tinnitus, the exact initial rating and effective date assigned are forwarded to the respective consideration of the AOJ, upon implementing the grant of compensation benefits. This is of particular importance given the situation here because in fact, the Veteran was rated at 50 percent for PTSD prior to September 26, 2012 which is not alone enough to meet the preliminary schedular standards for TDIU entitlement. See 38 C.F.R. § 4.16(a). So without an initial AOJ adjudication of benefits implementing a disability rating (with assigned effective date) for tinnitus it is hard to see where the claim for earlier effective date currently stands.

Therefore, the Board must defer action on the proper effective date for TDIU, pending the requisite AOJ action on the Board's tinnitus grant.

Accordingly, the claim is

REMAND

D for the following action:

1. The AOJ should promulgate a rating decision determining the assigned initial disability rating and effective date for the grant of service connection for tinnitus.

2. Thereafter, and as warranted from the record, conduct all further evidentiary development as warranted, (including if needed medical opinion regarding nature, severity and extent of tinnitus, and/or impact upon employability).

***11** 3. Then readjudicate the claim remaining on appeal for earlier effective date for TDIU, based upon all additional evidence received. Thereafter, if the benefit sought on appeal is not granted in full, the Veteran and his representative should be furnished with a Supplemental Statement of the Case (SSOC) and afforded an opportunity to respond before the file is returned to the Board for further appellate consideration.

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

This claims 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).

_____ S. S. Toth Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

Bd. Vet. App. 1629772, 2016 WL 4654941

K

Bd. Vet. App. 1409255, 2014 WL 1892991

Board of Veterans Appeals

Department of Veterans' Affairs

[TITLE REDACTED BY AGENCY]

10-46 733
Decision Date: 03/05/14
Archive Date: 03/12/14

***1** On appeal from the Department of Veterans Affairs Regional Office in Columbia, South Carolina

THE ISSUES

1. Entitlement to an initial disability rating in excess of 10 percent for arthritis of the left knee (previously claimed as left knee condition and degenerative arthritis).

2. Entitlement to an initial disability rating in excess of 10 percent prior to August 16, 2010 and in excess of 60 percent thereafter for keratosis pilaris.

3. Entitlement to an initial disability rating in excess of 20 percent prior to August 16, 2010 and in excess of 40 percent thereafter for varicose veins of the right lower extremity.

4. Entitlement to an initial disability rating in excess of 20 percent prior to August 16, 2010 and in excess of 40 percent thereafter for varicose veins of the left lower extremity.

5. Entitlement to an effective date earlier than January 10, 2007 for the grant of service connection for PTSD.

6. Entitlement to an initial disability rating in excess of 50 percent for posttraumatic stress disorder (PTSD).

REPRESENTATION

Veteran represented by:Virginia A. Girard-Brady, Esq.
ATTORNEY FOR THE BOARD
T. Blake, Associate Counsel

INTRODUCTION

The Veteran served on active duty from July 1967 to July 1987.

This case comes before the Board of Veterans' Appeals (Board) on appeal from a January 2009 rating decision granting service connection for the left knee disability, bilateral varicose veins, and keratosis pilaris, and from a May 2011 rating decision granting service connection for PTSD of the Department of Veterans Affairs (VA) Regional Office (RO) in Columbia, South Carolina.

In a December 2013 informal hearing presentation, the Veteran's representative asserts the following claims are also on appeal: (1) an effective date prior to August 16, 2010 for the award of a 60 percent rating for keratosis pilaris, and (2) the effective date of the awards of a 40 percent rating for varicose veins of each lower extremity. The Board finds these assertions are more properly characterized as disagreement with the staged ratings assigned and will be considered with the claims on appeal for these identified disabilities, as listed on the title page accordingly.

The claim for entitlement to a total rating based on individual unemployability (TDIU) has not been raised by the record at this time. See Rice v. Shinseki, 22 Vet. App. 447 (2009). The issue of an initial rating in excess of 50 percent for PTSD is addressed in the

REMAND

portion of the decision below and is

REMAND

D to the RO.

FINDINGS OF FACT

1. For the entire initial rating period on appeal, the service-connected arthritis of the left knee has been manifested by painful motion or limitation of extension with painful motion to 10 degrees, but not ankylosis, lateral instability or patellar subluxation, semilunar cartilage disorders, compensable limitation of flexion, tibia or fibula impairment, or genu recurvatum.

***2** 2. Prior to August 16, 2010, the service-connected keratosis pilaris manifested 15.7 percent of the entire body affected, 2.3 percent of exposed areas affected, and no required systemic therapy or other immunosuppressive drugs required for a total duration of six weeks or more during the past 12-month period.

3. As of August 16, 2010, the service-connected keratosis pilaris is assigned at 60 percent, the maximum rating authorized under DC 7813-7806.

4. Prior to August 16, 2010, the service-connected varicose veins of the bilateral lower extremities were manifested by persistent edema without stasis pigmentation or eczema.

5. As of August 16, 2010, the service-connected varicose veins of the bilateral lower extremities has been manifested by persistent edema and stasis pigmentation without persistent ulceration, massive board-like edema, or constant pain at rest.

6. The Veteran's initial claim of service connection for PTSD was received in June 2, 2005.

7. The Veteran separated from service in July 1987.

8. Service connection for PTSD was denied in a November 2005 rating decision by the RO.

9. New and material evidence was received within one year of the November 2005 rating decision.

10. The June 2005 claim of service connection for PTSD was pending as of January 10, 2007.

11. Manifestations ultimately diagnosed as PTSD was present at the filing of the June 2005 claim of service connection.

CONCLUSIONS OF LAW

1. The criteria for an initial disability rating in excess of 10 percent for arthritis of the left knee have not been met for any period. 38 U.S.C.A. §§ 1155, 5103, 5103A, 5107 (West 2002 & Supp. 2013); 38 C.F.R. §§ 3.159, 3.321, 4.3, 4.7, 4.59, 4.71a, Diagnostic Code (DC) 5003, 5010 (2013).

2. The criteria for an initial disability rating in excess of 10 percent prior to August 16, 2010 for keratosis pilaris have not been met for any period. 38 U.S.C.A. §§ 1155, 5103, 5103A, 5107 (West 2002 & Supp. 2013); 38 C.F.R. §§ 3.159, 3.321, 4.3, 4.7, 4.118, DC 7813-7806 (2013).

3. There is no legal basis for the assignment of a schedular evaluation in excess of 60 percent for keratosis pilaris as of August 16, 2010. 38 U.S.C.A. §§ 1155, 5103, 5103A, 5107; 38 C.F.R. §§ 3.159, 3.321, 4.3, 4.7, 4.118, DC 7813-7806.

4. The criteria for an initial disability rating in excess of 20 percent prior to August 16, 2010 and in excess of 40 percent thereafter for varicose veins of the right lower extremity have not been met for any period. 38 U.S.C.A. §§ 1155, 5103, 5103A, 5107 (West 2002 & Supp. 2013); 38 C.F.R. §§ 3.159, 3.321, 4.3, 4.7, 4.25, 4.26, 4.104, DC 7120 (2013).

5. The criteria for an initial disability rating in excess of 20 percent prior to August 16, 2010 and in excess of 40 percent thereafter for varicose veins of the left lower extremity have not been met for any period. 38 U.S.C.A. §§ 1155, 5103, 5103A, 5107; 38 C.F.R. §§ 3.159, 3.321, 4.3, 4.7, 4.25, 4.26, 4.104, DC 7120.

***3** 6. The criteria for an effective date of June 2, 2005, but no earlier, for the grant of service connection for PTSD have been met. 38 U.S.C.A. §§ 5101(a), 5110 (West 2002 & Supp. 2013); 38 C.F.R. §§ 3.1(p), 3.151(a), 3.155(a), 3.400 (2013).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

Duties to Notify and Assist

VA bears obligations to provide claimants with notice and assistance. 38 U.S.C.A. §§ 5103, 5103A; 38 C.F.R. §§ 3.159, 3.326(a); Dingess/Hartman v. Nicholson, 19 Vet. App. 473 (2006).

The Board finds that the duty to notify has been satisfied by December 2002, March 2007, and July 2010 letters. Since the claims discussed above arise from the Veteran's disagreement with the initial evaluations following the grant of service connection, no additional notice is required. See Hartman v. Nicholson, 483 F.3d 1311 (Fed. Cir. 2007); Dunlap v. Nicholson, 21 Vet. App. 112 (2007); 38 C.F.R. § 3.159(b)(3)(i); VAOPGCPREC 8-03.

Regarding the duty to assist, the evidence of record includes statements from the Veteran, VA outpatient treatment records, and VA examination reports dated December 2008, August 2010, April 2011, and May 2012 VA examination reports. The VA examiners recorded pertinent examination findings and provided conclusions with supportive rationale, thus are probative with regard to the nature and severity of the service-connected disabilities discussed below. See Nieves-Rodriguez v. Peake, 22 Vet. App. 295 (2008).

There is no indication that additional records exist pertaining to the issues discussed below, and if they did, that they would provide a basis to grant higher ratings.

The Board finds no further assistance to the Veteran with the development of evidence is required. See 38 U.S.C.A. § 5103A(a)(2); 38 C.F.R. § 3.159(d); see Mayfield v. Nicholson, 19 Vet. App. 103 (2005), rev'd on other grounds, 444 F.3d 1328 (Fed. Cir. 2006).

Disability Ratings - Laws and Regulations

Although the Board has an obligation to provide reasons and bases supporting these decisions, there is no need to discuss, in detail, the extensive evidence of record. See Gonzales v. West, 218 F.3d 1378, 1380-81 (Fed. Cir. 2000). Therefore, the Board will summarize the relevant evidence where appropriate, and the Board's analysis below will focus specifically on what the evidence shows, or fails to show, as to the claims on appeal.

In these decisions, the Board considers the lay evidence as it pertains to the disabilities on appeal. The Board must analyze the credibility and probative value of the evidence, account for the evidence which it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. See Gabrielson v. Brown, 7 Vet. App. 36, 39-40 (1994); Gilbert v. Derwinski, 1 Vet. App. 49, 57 (1990). A layperson is competent to report on the onset and continuity of his current symptomatology, that of which he or she has personal knowledge. See Layno v. Brown, 6 Vet. App. 465, 470 (1994).

***4** Disability evaluations are determined by the application of the schedule of ratings which is based on average impairment of earning capacity. See U.S.C.A. § 1155. Separate diagnostic codes identify the various disabilities. In order to evaluate the level of disability and any changes in condition, it is necessary to consider the complete medical history of a veteran's disability. See Schafrath v. Derwinski, 1 Vet. App. 589, 594 (1991).

The Board has considered the possibility of staged ratings for the service-connected disabilities on appeal, and concludes that the criteria have at no time been met. Accordingly, staged ratings are inapplicable. See 38 C.F.R. § 4.2; Fenderson v. West, 12 Vet. App. 119 (1999).

Where there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned. 38 C.F.R. § 4.7. When after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding the degree of disability such doubt will be resolved in favor of the claimant. 38 C.F.R. § 4.3. However, the evaluation of the same disability under various diagnoses, known as pyramiding, is to be avoided. 38 C.F.R. § 4.14.

Left Knee

The current appeal arises from a claim to reopen service connection received at the RO on October 29, 2002. A January 2009 rating decision granted service connection and assigned an initial 10 percent rating for arthritis with painful motion of the left knee, effective October 29, 2002, under DC 5260-5010. 38 C.F.R. §§ 4.59, 4.71a, DCs 5003, 5010, 5260. This evaluation is effective for the entire initial rating period from October 29, 2002 to the present.

Arthritis, due to trauma and substantiated by x-ray findings, is rated as degenerative arthritis. 38 C.F.R. § 4.71a, DC 5010. Degenerative arthritis established by x-ray findings is rated on the basis of limitation of motion under the appropriate diagnostic codes for the specific joint or joints involved. 38 C.F.R. § 4.71a, DC 5003. In the absence of 'limitation of motion,' a 10 percent evaluation is assigned where there is x-ray evidence shows involvement of two or more major joints or 2 or more minor joint groups, and a 20 percent evaluation is assigned where there is x-ray evidence of involvement of two or more major joints or two or more minor joint groups, with occasional incapacitating exacerbations. Id. The knee is considered a major joint. 38 C.F.R. § 4.45(f).

Limitation of motion of the knee is provided under DCs 5260 and 5261. See 38 C.F.R. § 4.71a. DC 5260 provides for a: * 10 percent rating where flexion is limited to 45 degrees; * 20 percent rating where flexion is limited to 30 degrees; * 30 percent rating where flexion is limited to 15 degrees.

DC 5261 provides for a: * 10 percent rating where extension is limited to 10 degrees; * 20 percent rating where extension is limited to 15 degrees; * 30 percent rating where extension is limited to 20 degrees; * 40 percent rating where extension is limited to 30 degrees; * 50 percent rating where extension is limited to 45 degrees.

***5** The normal range of motion of the knee is from zero to 140 degrees. 38 C.F.R. § 4.71, Plate II.

During the entire initial rating period on appeal, the Veteran exhibited the following range of motion results pursuant to VA examinations. In December 2008, limited flexion to 130 degrees and full extension to 0 degrees; in August 2010, limited flexion to 96 degrees and limited extension to 10 degrees; and in May 2012, full flexion to 140 degrees or greater and full extension to 0 degrees. A July 2004 VA outpatient Agent Orange examination also noted evaluation of the extremities revealed full range of motion.

The Board finds that the criteria for a compensable rating under DC 5260 were not met at any time. The criteria for a compensable rating under DC 5261 were met once at the August 2010 VA examination. The August 2010 examination report states that the extension was limited to '10 degrees to neutral with pain....' The Veteran's currently assigned 10 percent rating is assigned under DC 5010, through DC 5003, only because his limited of motion under the relevant DC was not compensable. When, as here, the limitation of motion becomes compensable, the 10 percent under DC 5010 would no longer be appropriate. Thus, the Veteran would warrant a 10 percent under DC 5010 at all times other than August 2010, and warranted a 10 percent under DC 5261 only in August 2010. The Board concludes that the criteria for a rating in excess of 10 percent are not met under DCs 5010 and 5261. 38 C.F.R. § 4.71a.

Moreover, the Veteran is only in receipt of service connection for arthritis of one major joint. 38 C.F.R. § 4.45(f). In the absence of involvement of more than one major joint or minor joint groups, a higher rating of 20 percent is not warranted for the service-connected arthritis of the left knee under DCs 5003 and 5010.

Next, the Board considers whether the criteria for a higher rating than 10 percent for limitation of motion of the left knee is warranted during the period of demonstrated compensable limitation of motion. See 38 C.F.R. §§ 4.40, 4.45.

In a December 2010 VA Form 21-4138, the Veteran reported constant symptoms of his left knee disability included pain and stiffness and flare-ups of swelling and pain five to six times per year. He also stated he must take rest breaks after standing for long periods and his activities of daily living are affected by limited walking and running.

At the time of the August 2010 VA joints examination, the Veteran reported increased stiffness, swelling, and constant pain. He also reported the left knee interferes with weight bearing, mobility, standing, concentration, productivity, exercising, driving, and the transfer of sitting to standing after driving. Following clinical evaluation, the VA examiner concluded that range of motion findings were not additionally limited following repetitive use. Thus, even when considering painful motion, the impairment caused by the service-connected arthritis did not more nearly approximate the

***6** Simply stated, at best, the evidence discussed above indicates the Veteran does not exhibit additional functional loss of the left knee during the period of demonstrated compensable limitation of motion. Therefore, the Board finds that there is no degree of functional loss during flare-ups and when the left knee joint is used repeatedly over time to warrant a rating in excess of 10 percent for limitation of motion pursuant to 38 C.F.R. §§ 4.40 and 4.45.

The Board also considered whether the other, potentially applicable DCs would result in additional compensation. The evidence does not show that the Veteran had ankylosis, lateral instability or patellar subluxation, a semilunar cartilage disorder, tibia or fibula impairment, or genu recurvatum at any time during the period on appeal. Ratings under alternative DCs for the knee are not warranted. 38 C.F.R. § 4.71a, DC 5256-5259, 5262, 5263. For these reasons and bases discussed above, and after fully considering all the lay and medical evidence regarding this service-connected disability for the entire initial rating period on appeal, the Board finds that the preponderance of the evidence is against an initial disability rating in excess of 10 percent for arthritis of the left knee. Accordingly, the benefit-of-the-doubt doctrine does not apply and the claim must be denied. 38 U.S.C.A. § 5107(b); 38 C.F.R. §§ 4.3, 4.7, 4.59, 4.71a.

Keratosis Pilaris

The current appeal arises from a claim for service connection received at the RO on October 29, 2002. A January 2009 rating decision granted service connection and assigned an initial 10 percent rating for keratosis pilaris, pursuant to DC 7813-7806, effective October 29, 2002. In a September 2010 rating decision, the initial rating was increased to 60 percent, effective August 16, 2010.

The applicable rating criteria for skin disorders, found at 38 C.F.R. § 4.118, were amended effective August 30, 2002 (see 67 Fed. Reg. 49,490 (July 31, 2002)) and again in October 2008 (see 73 Fed. Reg. 54,708 (September 23, 2008)). The October 2008 revisions are applicable to claims for benefits received by the VA on or after October 23, 2008. Id. As noted above, the Veteran's original claim for keratosis pilaris was in October 2002, and he has not requested evaluation under the revised ratings criteria. Therefore, only the post-2002 and pre-October 2008 version of the schedular criteria is applicable. The schedular rating criteria for DCs 7813-7806 was last amended in August 2002, thus the same criteria was in effect prior to October 23, 2008 to the present. The Board notes that the Veteran has been represented by an attorney with exclusive contact since before the grant of service connection. The attorney has not requested consideration under the revised ratings criteria.

Therefore, the Board will consider whether initial ratings in excess of 10 percent prior to August 15, 2010 and in excess of 60 percent from August 16, 2010 to the present are warranted relying on the pre-2008 ratings criteria. See 38 C.F.R. §§ 4.27 (explaining hyphenated diagnostic codes), 4.118, DC 7813-7806.

***7** Prior to October 2008, DC 7813 provides that dermatophytosis (ringworm: of body, tinea corporis; of head, tinea capitis; of feet, tinea pedis; of beard area, tinea barbae; of nails, tinea unguium; of inguinal area (jock itch), tinea cruris) is to be rated as disfigurement of the head, face, or neck (DC 7800), scars (DCs 7801, 7802, 7803, 7804, or 7805), or dermatitis (DC 7806), depending upon the predominant disability. See 38 C.F.R. § 4.118.

As will be discussed, the Veteran's keratosis pilaris is widely distributed across his body not involving the face or head without causing scarring. The Board finds that the predominant disability is dermatitis; therefore, the Veteran's disability will be rated under DC 7806.

DC 7806 provides evaluations for dermatitis or eczema at * 10 percent disabling with at least 5 percent, but less than 20 percent, of the entire body, or at least 5 percent, but less than 20 percent, of exposed areas affected, or; intermittent systemic therapy such as corticosteroids or other immunosuppressive drugs required for a total duration of less than six weeks during the past 12-month period; * 30 percent disabling with 20 to 40 percent of the entire body or 20 to 40 percent of exposed areas affected, or; systemic therapy such as corticosteroids or other immunosuppressive drugs required for a total duration of six weeks or more, but not constantly, during the past 12-month period; * 60 percent disabling with more than 40 percent of the entire body or more than 40 percent of exposed areas affected, or; constant or near-constant systemic therapy such as corticosteroids or other immunosuppressive drugs required during the past 12-month period. Id.

For the reasons that follow, the Board finds that the service-connected keratosis pilaris manifested 15.7 percent of the entire body affected and 2.3 percent of exposed areas affected, prior to August 16, 2010.

The Board notes initially that the Veteran's representative has not presented cogent argument as to the rating prior to August 16, 2010. In a November 2010 statement in lieu of a VA Form 9, she argued that the August 2010 VA examination report, upon which the ratings on and after August 16, 2010 are based, was inadequate because the examiner was required to determine when the disabilities first onset. For this argument, the representative relied on 38 C.F.R. § 3.156(c) and Vigil v. Peake, 22 Vet. App. 63 (2008). The Board notes that the record demonstrated that the disabilities had become manifest many years before which is why service connection was granted effective October 2002. Moreover, reliance on 38 C.F.R. § 3.156(c) and Vigil is misplaced. 38 C.F.R. § 3.156(c) pertains to receipt of additional service department records, which did not occur in this case. Vigil construes 38 C.F.R. § 3.156(c) within the context of a claim of entitlement to an earlier effective date for service connection. The Board concludes that the examiner had no obligation to determine the onset of the disability. In a November 2013 brief, the representative asserted without evidentiary support that the Veteran's keratosis pilaris should be rated as 60 percent disabling as of the date of service connection or in the alternative that the skin disability had worsened prior to August 16, 2010. The argument fails to discuss the relevant law or relevant evidence.

***8** The Board turns to the evidence of record.

The Veteran has not provided an independent statement regarding the extent or severity of his skin disability prior to August 16, 2010. October 2002, March 2004, December 2004, August 2009, and November 2010 statements in support of his various claims and appeals assert that he has a skin disability, but do not describe its extent or severity. A December 2010 statement indicated that the disability covered 60 to 80 percent of his body. He also reported worsening since his last VA examination in January 2010. The Board notes that the last VA examination was in fact in August 2010, and that this allegation of worsening does not affect the rating prior to August 16, 2010.

The Veteran's regular treatment records provide little information regarding the severity of his keratosis pilaris. VA treatment records from March 2002 through August 2010 and Moncrief Army Community Hospital from October 2004 to May 2008 do not contain assessments which allow for application of the ratings criteria.

At an April 2006 Board hearing, the Veteran testified that he was previously prescribed salicylic acid and self-medicates with oils and lotions.

The Veteran was evaluated at a December 2008 VA examination. He told the examiner that he was prescribed acetic acid six to seven years ago but that was ineffective, and has not used any corticosteroid, other immunosuppressive drugs, or intensive light therapy in the past. Such evidence shows this service-connected disability has not been manifested by required systemic therapy or other immunosuppressive drugs required for a total duration of six weeks or more during the past 12-month period. The examiner conducted an examination and calculation of the extent of the keratosis pilaris. The examiner determined that the disorder manifested with 15.7 percent of the entire body affected and 2.3 percent of exposed areas affected.

This is the only evaluation of percent of body affected and percent of exposed areas affected. The Veteran denied the use of corticosteroids or other immunosuppressive drugs at the examination.

The Board also notes that the August 16, 2010 VA examination, upon which the later 60 percent rating is based, was ordered spontaneously by the RO. This examination report indicated greatly worsened manifestations compared to earlier evidence. The Veteran, however, did not submit a statement that his keratosis pilaris had worsened in severity between December 2008 and August 2010. Instead, the Veteran submitted a Notice of Disagreement to the initial rating without specifying the substance of his disagreement. The Board finds that there are no lay or medical reports of worsening symptoms which might justify a finding that the August 2010 VA examination report documented earlier

worsening. The Board finds that the worsened symptoms shown in August 2010 were not factually ascertainable prior to August 16, 2010.

The Board finds that the keratosis pilaris manifested with 15.7 percent of the entire body affected and 2.3 percent of exposed areas affected prior to August 16, 2010. As a result, the Board concludes that an initial rating in excess of the currently-assigned 10 percent rating prior to August 16, 2010 is not warranted under DCs 7813-7806.

***9** The Board considers whether a disability rating in excess of 10 percent is warranted under any other diagnostic codes pertaining to a skin disability prior to August 16, 2010. Particularly, DCs 7800-7805 provide for disability rating higher than 10 percent.

In addition, the Board finds the predominant disability is dermatitis, so DCs 7801-7805 do not apply. Therefore, an initial disability rating in excess of the currently assigned 10 percent rating prior to August 16, 2010 under DCs 7800-7805 is not warranted.

As of August 16, 2010, the service-connected keratosis pilaris is rated at the maximum rating available under DCs 7813-7806. Therefore, the Board considers whether a rating in excess of 60 percent is warranted under any other diagnostic codes pertaining to a skin disability as of August 16, 2010. Particularly, DC 7800 provides an 80 percent disability rating for scars or other disfigurement of the head, face, or neck. The August 2010 VA examination report and the December 2010 statement from the Veteran indicate involvement of the neck. A rating in excess of 60 percent would only be available if there was gross distortion or asymmetry of facial features or six or more characteristics of disfigurement. The facial features are not located on the neck and, therefore, are not distorted or asymmetrical due to the service-connected keratosis pilaris. Similarly, to have at least six characteristics of disfigurement would require either scarring or underlying tissue loss. These characteristics are not present. Thus, the Board concludes DC 7800 does not afford a higher rating for the Veteran's service-connected disability.

DC 7817 provides a 100 percent disability rating for exfoliative dermatitis (erythroderma) with generalized involvement of the skin, plus systemic manifestations (such as fever, weight loss, and hypoproteinemia), and; constant or near-constant systemic therapy required during the past 12-month period. See 38 C.F.R. § 4.118. As noted above, the Veteran's keratosis pilaris is not located on the head, face, or neck. In addition, on VA examination in August 2010, he denied, in pertinent part, erythema multiforme, fever, and weight loss, and use of corticosteroids, other immunosuppressants, or light therapy.

For these reasons and bases discussed above, and after fully considering all the lay and medical evidence regarding this service-connected disability for the identified appeal periods, the Board finds that the evidence is against initial disability ratings in excess of 10 percent prior to August 16, 2010 and in excess of 60 percent thereafter for keratosis pilaris for any period. To the extent any higher level of compensation is sought, the evidence is against this claim, and hence the benefit-of-the-doubt doctrine does not apply. 38 U.S.C.A. § 5107(b); 38 C.F.R. §§ 4.3, 4.7, 4.118.

Varicose Veins of the Bilateral Lower Extremities

The current appeal arises from a claim for service connection received at the RO on October 29, 2002. A January 2009 rating decision granted service connection and assigned an initial 20 percent rating for varicose veins of each lower extremity, pursuant to DC 7120, effective October 29, 2002. In a September 2010 rating decision, the initial rating was increased to 40 percent, effective August 16, 2010.

***10** Therefore, the evaluation of 20 percent is effective from October 29, 2002 to August 15, 2010 and the evaluation of 40 percent is effective from August 16, 2010 to the present. See 38 C.F.R. § 4.104, DC 7120.

DC 7120 provides for varicose veins at: * 20 percent with persistent edema, incompletely relieved by elevation of extremity, with or without beginning stasis pigmentation or eczema; * 40 percent with persistent edema and stasis pigmentation or eczema, with or without intermittent ulceration; * 60 percent with persistent edema or subcutaneous induration, stasis pigmentation or eczema, and persistent ulceration; * 100 percent with the following findings attributed to the effects of varicose veins: massive board-like edema with constant pain at rest. Id. Note: These evaluations are for involvement of a single extremity. If more than one extremity is involved, evaluate each extremity separately and combine (under 38 C.F.R. § 4.25), using the bilateral factor (38 C.F.R. § 4.26), if applicable. Id. As with the initial keratosis pilaris ratings discussed above, the Veteran's representative has not presented cogent argument on the varicose vein ratings. For the reasons that follow, the Board finds that the service-connected varicose veins of the bilateral lower extremities was manifested by persistent edema without stasis pigmentation or eczema prior to August 16, 2010.

As with the keratosis pilaris, the Veteran has not provided an independent statement regarding the extent or severity of his skin disability. October 2002, March 2004, December 2004, August 2009, November 2010, and December 2010 statements in support of his various claims and appeals assert that he has a skin disability, but do not describe its extent or severity.

At the April 2006 Board hearing, the Veteran testified he has swelling in the left ankle, above the knee.

On VA examination in December 2008, the Veteran reported occasional edema relieved by elevating the legs, and denied any abnormal sensations in the leg at rest or after prolonged standing or walking or use of compression hosiery as treatment. Clinical findings revealed 1+ bilateral lower extremity edema from the ankles to above each knee, and board-like, persistent type edema, but no evidence of ulcers or stasis pigmentation in either lower extremity.

As such, the Board finds that during the period prior to August 16, 2010, the service-connected varicose veins of the bilateral lower extremities were manifested by persistent edema without stasis pigmentation or eczema. The Board concludes that initial ratings in excess of 20 percent are not warranted for varicose veins of either lower extremity.

The Board finds that, as of August 16, 2010, the service-connected varicose veins of the bilateral lower extremities has been manifested by persistent edema and stasis pigmentation without persistent ulceration, massive board-like edema, or constant pain at rest.

On VA examination in August 2010, the Veteran reported swelling and discoloration, worsened by exercise and exertion. The examiner observed edema of the ankles relieved by elevation of the extremities and that the Veteran uses compression stockings. Clinical findings revealed the presence of mild nonboard-like edema and stasis pigmentation of the feet, and no findings of ulcer or eczema.

***11** In a December 2010 VA Form 21-4138, the Veteran reported constant symptoms include legs and ankles are swollen and discolored (blue), and ankles are dry and the skin is scaling.

On VA examination in May 2012, symptoms noted by the examiner, were bilateral persistent edema and aching and fatigue in the legs after prolonged standing or walking. There was no reported functional impairment. Upon further questioning, the Veteran clarified his whole body is fatigued, not necessarily his legs. The VA examiner concluded 'it does seem as though that [the Veteran's] varicose veins have not increased in severity.'

As such, the Board finds that during this appeal period, the service-connected varicose veins of the bilateral lower extremities has been manifested by persistent edema or subcutaneous induration, stasis pigmentation without persistent ulceration, massive board-like edema, or constant pain at rest.

For these reasons and bases discussed above, and after fully considering all the lay and medical evidence regarding this service-connected disability for the identified appeal periods, the Board finds that the evidence is against initial disability ratings in excess of 20 percent prior to August 16, 2010 and in excess of 40 percent thereafter for varicose veins of the bilateral lower extremities for any period. To the extent any higher level of compensation is sought, the evidence is against this claim, and hence the benefit-of-the-doubt doctrine does not apply. 38 U.S.C.A. § 5107(b); 38 C.F.R. §§ 4.3, 4.7, 4.104.

Additional Considerations

With regard to the service-connected disabilities discussed above, the Board considers all other potentially applicable provisions of 38 C.F.R. Parts 3 and 4. See Schafrath, 1 Vet. App. at 594. However, after careful review of the available diagnostic codes, and consideration of the lay and medical evidence of record, the Board finds there are no other diagnostic codes that provide a basis to assign a higher rating for these disabilities on appeal at any time during the initial rating periods.

An extra-schedular rating may be provided in exceptional cases. 38 C.F.R. § 3.321; Thun v. Peake, 22 Vet. App. 111, 115 (2008), aff'd sub nom. Thun v. Shinseki, 572 F.3d 1366 (Fed. Cir. 2009).

With regard to the service-connected arthritis and limitation of motion of the left knee, the schedular rating criteria adequately contemplate and describe the symptoms and impairment caused by these service-connected disabilities. Higher evaluations of 20 percent during the initial rating period are provided under the schedular rating criteria (38 C.F.R. §§ 4.40, 4.45, 4.59, 4.71a, DCs 5003, 5010, 5261) for certain manifestations of the disability at issue, specifically including noncompensable limitation of motion and arthritis with occasional incapacitating episodes, flexion limited to 30 degrees or less, and extension limited to 15 degrees or more. However, the competent and more probative evidence of record demonstrates that these service-connected disabilities have not been manifested by such symptomatology. There are no manifestations of the left knee disability which are not contemplated by the rating criteria.

***12** With regard to the service-connected keratosis pilaris, the schedular rating criteria adequately contemplate and describe the symptoms and impairment caused by this disability. A higher evaluation than 10 percent prior to August 16, 2010 and 60 percent thereafter are provided under the schedular rating criteria (DCs 7813-7806) for certain manifestations of the disability at issue, specifically including 20 percent or more of the entire body affected, 20 percent or more of exposed areas affected, or use of systemic therapy. However, the competent and more probative evidence of record demonstrates that this service-connected disability has not been manifested by such symptomatology. There are no manifestations of the keratosis pilaris which are not contemplated by the ratings criteria. Moreover, the Veteran denied that his skin disability affected his work at the August 2010 VA examination. He also rarely receives treatment for the disability and has not been hospitalized for it. The Board finds that the evidence does not show an unusual or an exceptional disability picture so as to render application of the ratings schedule impractical.

With regard to the service-connected varicose veins of the bilateral lower extremities, the Board finds that the schedular rating criteria (DC 7120) do not adequately contemplate and describe the symptoms and functional impairment caused by these disabilities. Specifically, such symptoms and impairment beyond what is provided for higher ratings in the schedular rating criteria include fatigue after prolonged periods of walking and standing, cramping, pain, aching, and sleep disturbance because of frequent urination due to a diuretic daily treatment for edema, as reported by the Veteran at the April 2006 Board hearing, December 2008, August 2010, and May 2012 VA examinations, and in a December 2010 VA Form 21-4138. Nonetheless, the Board finds the Veteran's exceptional disability picture does not exhibit other related factors such as those provided by 38 C.F.R. § 3.321(b)(1) as ‘governing norms,‘ to include marked interference with employment or frequent periods of hospitalization due to these service-connected disabilities. In fact, the May 2012 VA examiner documented there was no reported functional impairment.

With regard to the service-connected PTSD, the schedular rating criteria adequately contemplate and describe the symptoms and impairment caused by this disability. A higher evaluation than 50 percent for the entire initial rating period is provided under the schedular rating criteria (DC 9411) for certain manifestations of the disability at issue, specifically including occupational and social impairment with deficiencies in most areas or total occupational and social impairment due to psychiatric symptomatology. However, the competent and more probative evidence of record demonstrates that this service-connected disability has not been manifested by such symptomatology. There are no manifestations of PTSD which are not contemplated by the rating criteria. As a result, referral for extra-schedular consideration for these service-connected disabilities on appeal is not required.

***13** Earlier Effective Date for the Grant of Service Connection for PTSD

The Veteran contends that he is entitled to an effective date earlier than January 10, 2007 for the grant of service connection for PTSD. Specifically, he asserts that the effective date should be in June 2005. For the reasons that follow, the Board concludes that an effective date of June 2005, but no earlier, is warranted for the grant of service connection for PTSD.

In relevant part, the effective date of an evaluation and award of compensation based on an original service connection claim will be the date of receipt of the claim or the date entitlement arose, whichever is the later, unless the date of receipt of the claim is within one year of service separation. 38 U.S.C.A. § 5110(a); 38 C.F.R. § 3.400(b). If a claim is received within one year of service separation, service connection may be awarded on the day following separation from service. Id.

The Veteran filed his initial claim of entitlement to service connection for PTSD in June 2005. A statement, date stamped as received on June 2, 2005, states that the Veteran wanted an exam for service-connected PTSD. The Veteran does not allege and the record does not otherwise suggest that an earlier claim for service connection for PTSD was filed. See 38 C.F.R. §§ 3.151, 3.155 (2013). This date of receipt of claim was clearly not within one year of the Veteran's July 1987 discharge from service.

The June 2005 claim was denied in a November 2005 rating decision. Appropriate notice was provided to the Veteran at his address of record in November 2005.

A rating decision becomes final when a claimant does not file a notice of disagreement within one year after a decision is issued. 38 U.S.C.A. § 7105. New and material evidence received within a year after the rating decision will be considered as having been filed in connection with the claim. 38 C.F.R. § 3.156(b). Receipt of new and material evidence can prevent finality from attaching even if no notice of disagreement is filed. See Bond v. Shinseki, 659 F.3d 1362, 1367-68 (Fed. Cir. 2011).

In denying the claim, the RO found that the evidence failed to show a diagnosis of PTSD and was insufficient to confirm that he was engaged in combat or was a prisoner of war. The RO also noted treatment records from Moncrief Army Hospital do not show a diagnosis of PTSD, and no response was received from the Veteran pursuant to a July 2005 notice letter requesting any additional information regarding a diagnosis and in-service stressor.

An April 2006 stressor statement was submitted by the Veteran and received prior to the expiration of the appeal period. Specifically, the Veteran discussed his experiences while serving active duty in Vietnam.

The April 2006 stressor statement contained evidence new to the file, addressing one of the grounds of the November 2005 denial of service connection, and raising a reasonable possibility of substantiating the claim. The April 2006 statement was new and material evidence. 38 C.F.R. § 3.156(b). Therefore, the Board finds that the November 2005 rating decision did not become final. See 38 U.S.C.A. § 7105; 38 C.F.R. §§ 3.104, 3.156, 20.302, 20.1103.

***14** Approximately nine months after submission of the April 2006 stressor statement, the RO received the Veteran's claim to reopen service connection for PTSD on January 10, 2007. In a June 2007 rating decision, the RO denied reopening the claim. The Veteran filed an untimely August 2009 notice of disagreement; however, the RO submitted a January 2010 statement of the case (SOC) and the Veteran perfected the appeal with a timely August 2010 VA Form 9.

Thereafter, in a May 2011 rating decision, the RO determined that based on receipt of new and material evidence, specifically an April 2011 VA examination report, which shows a clinical diagnosis of PTSD related to the claimed in-service stressor in which he feared for his life due to hostile military activity, service connection for PTSD has been established as directly related to military service. The RO assigned a 30 percent disability rating, effective January 10, 2007.

The RO's determination that the earliest pending date of receipt of claim was January 10, 2007 is a favorable finding that the Board cannot disturb. This waives the potential finality of the June 2007 rating decision. The Board finds, however, that the January 10, 2007 claim was not the earliest pending claim. Because the November 2005 rating decision did not become final, the June 2005 claim is the earliest pending claim. The Board turns to consider the date entitlement arose. 38 C.F.R. § 3.400(b).

The November 2005 rating decision denied the claim in part because of the lack of a diagnosis of PTSD. The record does not reflect a diagnosis of PTSD until April 2011. The lack of a diagnosis at the time of claim filing is not fatal. Entitlement to service connection arises with manifestations, not diagnosis, of a disability and filing of a claim for benefits. DeLisio v. Shinseki, 25 Vet. App. 45, 55 (2011). The Veteran was receiving treatment during the period between June 2005 and April 2011 for symptoms that were ultimately diagnosed as PTSD. Resolving reasonable doubt in favor of the Veteran, the Board finds that manifestations of PTSD were present at the filing of the June 2, 2005 claim for service connection for PTSD. The Board concludes that the criteria for an effective date of June 2, 2005 for the grant of service connection for PTSD are met. 38 C.F.R. § 3.400(b).

There are some exceptions to the regulations set forth in 38 C.F.R. § 3.400. One pertains to certain herbicide exposed veterans qualifying under 38 C.F.R. § 3.816 and is not relevant here. See Nehmer v. United States Veterans Administration, 712 F. Supp. 1404 (N.D. Cal., May 2, 1989). The other exception states that if compensation is awarded pursuant to a liberalizing law, the effective date of such award shall be fixed in accordance with the facts found, but shall not be earlier than the effective date of the act or administrative issue. 38 U.S.C.A. § 5110(g); 38 C.F.R. §§ 3.114, 3.400(p); McCay v. Brown, 9 Vet. App. 183 (1996), aff'd 106 F.3d 1577 (Fed. Cir. 1997).

***15** The VA regulations governing service connection for PTSD, found at 38 C.F.R. § 3.304(f), were amended after the Veteran began to claim service connection for PTSD. Specifically, PTSD based on stressors related to fear of hostile military or terrorist activity were to be allowed provided that a VA psychiatrist or psychologist, or a psychiatrist or psychologist contracted by VA, confirmed that the claimed stressor was adequate to support a PTSD diagnosis and was consistent with the places, types, and circumstances of the veteran's service. 75 Fed. Reg. 39,843 -39,852 (Jul. 13, 2010) (codified at 38 C.F.R. § 3.304(f)(3) (2013)). The rulemaking states clearly that the 'liberalizing law change' provisions are not for application as the rulemaking was considered a procedural and not substantive change. Id., at 39,851.

Based on these findings, and applying the regulation that provides the proper effective date for disability compensation based on new and material evidence other than service department records received after final disallowance, the Board concludes that an effective date of June 2, 2005, but no earlier, for the grant of service connection for PTSD is warranted. See 38 U.S.C.A. § 5110(a), (b)(1); 38 C.F.R. § 3.400.

ORDER

An initial disability rating in excess of 10 percent for arthritis of the left knee is denied.

A separate 10 percent disability rating, but no higher, for limitation of motion of the left knee is granted, subject to the criteria applicable to the payment of monetary benefits.

An initial disability rating for keratosis pilaris in excess of 10 percent prior to August 16, 2010 and in excess of 60 percent thereafter is denied.

An initial disability rating for varicose veins of the right lower extremity in excess of 20 percent prior to August 16, 2010 and in excess of 40 percent thereafter is denied.

An initial disability rating for varicose veins of the left lower extremity in excess of 20 percent prior to August 16, 2010 and in excess of 40 percent thereafter is denied.

An effective date of June 2, 2005, but no earlier, for the grant of service connection for PTSD is granted.

REMAND

The current appeal arises from a claim for service connection received at the RO on January 10, 2007. In a May 2011 rating decision, the RO granted service connection and assigned an initial 30 percent rating for PTSD, pursuant to DC 9411, effective January 10, 2007. The Board has granted an earlier effective date of June 2, 2005 for the grant of service connection. The RO has not had considered and assigned an initial rating for the period prior to January 10, 2007. Should the Board proceed to consider the initial rating prior to January 10, 2007, the Veteran would be deprived of the opportunity for one review on appeal for that issue. The Board remands to afford due process. Bernard v. Brown, 4 Vet. App. 384, 394 (1993).

Accordingly, the case is

REMAND

D for the following action:

***16** The RO should readjudicate the initial rating for PTSD on the merits and assign an appropriate initial rating for the period prior to January 10, 2007. If the benefits sought are not granted, the Veteran and his representative should be furnished a Supplemental Statement of the Case and afforded a reasonable opportunity to respond before the record is returned to the Board for further review.

The appellant has the right to submit additional evidence and argument on the matter 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 Supp. 2013).

_____ J.B. FREEMAN Acting Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

Bd. Vet. App. 1409255, 2014 WL 1892991

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