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

IN THE APPEAL OF [redacted]
ANDRE MARTINEZ

DOCKET NO. 04-20 549A) DATE *January 27, 2017*
) *SDM*
)

On appeal from the
Department of Veterans Affairs Regional Office in St. Petersburg, Florida

THE ISSUES

1. Entitlement to service connection for a joint disorder of the left hip, left knee, and left ankle.

2. Entitlement to service connection for sleep apnea, to include as secondary to posttraumatic stress disorder (PTSD) with major depressive disorder.

3. Entitlement to an increased initial rating for status-post L3-L4 hemilaminectomy and microdiscectomy (claimed as back condition), rated as 20 percent disabling.

4. Entitlement to an increased initial rating for radiculopathy of the left lower extremity, associated with status-post L3-L4 hemilaminectomy and microdiscectomy (claimed as back condition), rated as 20 percent disabling.

5. Entitlement to an increased initial rating for peripheral neuropathy of the right lower extremity associated with diabetes type II, rated as 10 percent disabling.

6. Entitlement to increased initial ratings for peripheral neuropathy of the left lower extremity associated with diabetes type II, rated as 10 percent disabling prior to December 15, 2010, and 40 percent disabling therefrom.

7. Entitlement to an increased initial rating for PTSD with major depressive disorder, rated as 30 percent disabling.

8. Entitlement to a compensable initial rating for headaches to include migraine headaches.

9. Entitlement to a total disability rating based upon individual unemployability (TDIU) due to service-connected disabilities.

10. Entitlement to an effective date earlier than March 31, 2011, for the grant of service connection for PTSD.

REPRESENTATION

Appellant represented by: Stacey Penn Clark, Attorney

WITNESS AT HEARING ON APPEAL

The Veteran

ATTORNEY FOR THE BOARD

T. J. Anthony, Associate Counsel

INTRODUCTION

The Veteran had active service from January 1969 to December 1970 and from September 1981 to April 1988.

These matters are before the Board of Veterans' Appeals (Board) on appeal of a November 2006 rating decision by the Department of Veterans Affairs (VA) Regional Office (RO) in Huntington, West Virginia; a May 2013 rating decision by the VA RO in New York, New York; October 2013 and January 2014 rating decisions by the VA Appeals Management Center in Washington, DC; and a March 2016 rating decision by the VA RO in St. Petersburg, Florida. This case is currently under the jurisdiction of the St. Petersburg, Florida VA RO.

The Board previously remanded the issues of entitlement to service connection for a joint disorder of the left hip, left knee, and left ankle, and entitlement to service connection for sleep apnea in February 2010, April 2012, and January 2014.

In May 2008, the Veteran presented testimony as to the issue of entitlement to service connection for PTSD before a Veterans Law Judge (VLJ) of the Board. A transcript of the hearing is of record. The VLJ who conducted the May 2008 Board hearing is not available to participate in making a decision on the issues before the Board, to include those relating to the Veteran's now service-connected PTSD. In a June 2016 letter, the Board informed the Veteran that the VLJ who conducted his Board hearing is not available to participate in a decision on his appeal. The letter provided the Veteran the opportunity to testify at another hearing. *See* 38 U.S.C.A. § 7107(c) (West 2014); 38 C.F.R. §§ 19.3(b), 20.707 (2015). However, in July 2016, the Veteran submitted a response indicating he does not wish to appear at another Board hearing and that he wishes for his case to be considered on the evidence of record. As such, the Board will proceed with appellate review.

In February 2010, April 2012, and January 2014, the Board remanded the issue of entitlement to service connection for an acquired psychiatric disorder other than PTSD. The Veteran was granted entitlement to service connection for major depressive disorder in a May 2016 rating decision. As this represents a total grant

of the benefit sought on appeal with respect to that issue, it is not before the Board at this time. *See Grantham v. Brown*, 114 F.3d 1156, 1159 (Fed. Cir. 1997).

Following the most recent adjudications of the issues on appeal by the Agency of Original Jurisdiction (AOJ), the Veteran submitted additional evidence. In an October 2016 statement, the Veteran's representative waived initial consideration of that evidence by the AOJ. Accordingly, the Board may proceed with appellate consideration and accepts the additional evidence for inclusion in the record on appeal. *See* 38 C.F.R. § 20.1304(c).

The issue of whether there was clear and unmistakable error (CUE) in a September 2003 rating decision, which denied entitlement to service connection for PTSD, has been raised by the record in a December 2013 statement, but has not been adjudicated by the AOJ. *See* VA Form 21-0958, Notice of Disagreement, received in December 2013. 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).

The Board notes that, because CUE claims are unique claims that are collateral attacks on prior final rating decisions, and because the law and regulations governing such issues are different from those involved in addressing a claim for an earlier effective date, the CUE claim referred herein to the AOJ is not intertwined with the earlier effective date issue decided herein. This is so even though a finding of CUE may result in the grant of an earlier effective date.

The issues of entitlement to service connection for a joint disorder of the left hip, left knee, and left ankle; entitlement to an increased initial rating for status-post L3-L4 hemilaminectomy and microdiscectomy (claimed as back condition); entitlement to an increased initial rating for radiculopathy of the left lower extremity, associated with status-post L3-L4 hemilaminectomy and microdiscectomy (claimed as back condition); entitlement to an increased initial rating for peripheral neuropathy of the right lower extremity associated with diabetes type II; entitlement to increased initial ratings for peripheral neuropathy of the left lower extremity associated with diabetes type II; entitlement to an increased initial rating for PTSD with major

depressive disorder; entitlement to a compensable initial rating for headaches to include migraine headaches; and entitlement to a TDIU are addressed in the REMAND portion of the decision below and are REMANDED to the AOJ.

FINDINGS OF FACT

1. The Veteran's sleep apnea did not have onset during his active service, is not otherwise related to his active service, nor was it proximately due to, the result of, or aggravated by his service-connected PTSD with major depressive disorder.

2. A February 22, 2010 Board decision denied entitlement to service connection for PTSD; the Veteran did not submit a motion for reconsideration of the February 2010 Board decision and did not appeal that decision in a timely manner.

3. No communication from the Veteran received between February 22, 2010, and March 30, 2011, may be construed as a formal or informal claim to reopen the previously denied claim for entitlement to service connection for PTSD.

4. The Veteran's petition to reopen the previously denied claim for entitlement to service connection for PTSD was received by VA on March 31, 2011.

CONCLUSIONS OF LAW

1. The criteria for entitlement to service connection for sleep apnea, to include as secondary to PTSD with major depressive disorder, are not met. 38 U.S.C.A. §§ 1110, 1131, 5103, 5107A (West 2014); 38 C.F.R. §§ 3.102, 3.159, 3.303, 3.310 (2015).

2. The February 2010 Board decision is final. 38 U.S.C.A. § 7104 (West 2014); 38 C.F.R. § 20.1100 (2015).

3. The criteria for entitlement to an effective date earlier than March 31, 2011, for the grant of service connection for PTSD have not been met. 38 U.S.C.A. §§ 5103, 5103A, 5107, 5110 (West 2014); 38 C.F.R. §§ 3.155, 3.160 (2014); 38 C.F.R. §§ 3.102, 3.159, 3.400, 20.1104 (2015).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

VA's Duty to Notify and Assist

Pursuant to the Veterans Claims Assistance Act of 2000 (VCAA), VA has duties to notify and assist claimants in substantiating a claim for VA benefits. 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5107, 5126 (West 2014); 38 C.F.R. §§ 3.159, 3.326 (2015); s*ee also Pelegrini v. Principi*, 18 Vet. App. 112 (2004); *Quartuccio v. Principi*, 16 Vet. App. 183 (2002); *Mayfield v. Nicholson*, 444 F.3d 1328 (Fed. Cir. 2006); *Dingess/Hartman v. Nicholson*, 19 Vet. App. 473 (2006).

In regard to the appeal for an earlier effective date for the grant of service connection for PTSD, such appeal arises from the Veteran's disagreement with the effective date awarded following the grant of service connection for that disability. Where the initial claim is one for service connection, once service connection has been granted, the claim has been substantiated. Therefore, the initial intended purpose of the notice has been fulfilled and additional VCAA notice under §§ 5103(a) is not required. Any defect in the notice is not prejudicial. *Goodwin v. Peake*, 22 Vet. App. 128 (2008); *Dunlap v. Nicholson*, 21 Vet. App. 112 (2007). Rather, once a notice of disagreement has been filed, for example, contesting a downstream issue such as the effective date assigned for the grant of service connection, only the notice requirements for a rating decision and statement of the case described in 38 U.S.C.A. §§ 5104 and 7105 control as to the further communications with the Veteran, including as to what evidence is necessary to establish a more favorable decision. 38 C.F.R. § 3.159(b)(3). Here, the AOJ provided the Veteran the required statement of the case in August 2015. The statement of the case cites the statutes and regulations applicable to the assignment

of an effective date and discusses the reasons and bases for not assigning an earlier effective date in this case.

As to the Veteran's claim for entitlement to service connection for sleep apnea, VA's duty to notify was satisfied by a letter dated in May 2006. *See* 38 U.S.C.A. §§ 5102, 5103, 5103A; 38 C.F.R. § 3.159; *see also Scott v. McDonald*, 789 F.3d 1375 (Fed. Cir. 2015).

VA has also satisfied its duty to assist the Veteran. The Veteran's service treatment records, service personnel records, and relevant treatment records have been associated with the record. 38 U.S.C.A. § 5103A; 38 C.F.R. § 3.159.

In addition, the Veteran was provided VA examinations in March 2014 and January 2016 that provided information relevant to his claim for entitlement to service connection for sleep apnea. The examiners who conducted the March 2014 and January 2016 VA examinations reviewed the record, considered the Veteran's reported symptomatology and medical history, and addressed the likely etiology of the Veteran's sleep apnea, providing supporting explanation and rationale for all conclusions reached. The examinations were thorough, and all necessary evidence and testing was considered by the examiners. The examiners provided all information necessary to render a decision as to the Veteran's claim for entitlement to service connection for sleep apnea. Therefore, the Board finds the examinations to be adequate for decision-making purposes. *See Barr v. Nicholson*, 21 Vet. App. 303, 312 (2007); *see also* 38 C.F.R. § 3.159(c)(4).

There is no indication in the record that any additional evidence, relevant to the issues adjudicated in this decision, is available and not part of the record. *See Pelegrini v. Principi*, 18 Vet. App. 112 (2004). As there is no indication that any failure on the part of VA to provide additional notice or assistance reasonably affects the outcome of the 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. at 486; *Shinseki v. Sanders/Simmons*, 129 S. Ct. 1696 (2009).

Compliance with Board Remands

As noted in the Introduction, the Board remanded the issue of entitlement to service connection for sleep apnea in February 2010, April 2012, and January 2014. Relevant to that issue, the February 2010 Board remand directed the AOJ to make appropriate efforts to obtain copies of the Veteran's service treatment records from his active service in the National Guard from September 1981 to April 1988, and then readjudicate the claim and issue a supplemental statement of the case, if warranted. Pursuant to the February 2010 Board remand, the AOJ communicated with the New York State Division of Military and Naval Affairs to obtain service treatment records and service personnel records for the Veteran's period of active service from September 1981 to April 1988; associated the records received with the record; and readjudicated the issue in a November 2011 supplemental statement of the case. However, in its April 2012 remand, the Board found the records obtained to be incomplete.

Because the records obtained were incomplete, the April 2012 Board remand directed the AOJ to locate any further available Army Reserve treatment records and active duty service records. Relevant to the issue of entitlement to service connection for sleep apnea, the April 2012 Board remand also directed the AOJ to obtain updated VA treatment records; provide the Veteran with the necessary forms to authorize release of any private treatment records not currently of record; provide the Veteran with an authorization form for the release of any health records maintained by his former employer, the United States Postal Service; take appropriate steps to obtain records from the Office of Personnel Management regarding the Veteran's eligibility for disability benefits; and then readjudicate the claim and issue a supplemental statement of the case, if warranted. Pursuant to the April 2012 Board remand, the AOJ obtained updated VA treatment records and provided the Veteran with the necessary forms to authorize release of any private treatment records not currently of record. In April 2013, the Veteran indicated that he had no further documents to submit. The AOJ also made efforts to obtain any further available service records. However, in April 2013, the State of New York Division of Military and Naval Affairs indicated that no further records were available. The AOJ also obtained records from the United States Postal Service

Health Unit. Records from the Office of Personnel Management pertaining to the Veteran's disability retirement are also of record. The AOJ readjudicated the issue in an October 2013 supplemental statement of the case. Accordingly, the Board finds that VA at least substantially complied with the April 2012 Board remand. *See* 38 U.S.C.A. § 5103A(b); *Stegall v. West*, 11 Vet. App. 268, 271 (1998); *D'Aries v. Peake*, 22 Vet. App. 97, 105 (2008).

Relevant to the issue of entitlement to service connection for sleep apnea, the January 2014 Board remand directed the AOJ to obtain updated VA treatment records, schedule the Veteran for a VA examination to determine the likely etiology of his sleep apnea, and then readjudicate the claim and issue a supplemental statement of the case, if warranted. Pursuant to the January 2014 Board remand, the AOJ obtained updated VA treatment records, provided the Veteran VA examinations in March 2014 and January 2016 that were consistent with and responsive to the January 2014 Board remand directives, and readjudicated the claim in a May 2016 supplemental statement of the case. Accordingly, the Board finds that VA at least substantially complied with the January 2014 Board remand. *See* 38 U.S.C.A. § 5103A(b); *Stegall*, 11 Vet. App. at 271; *D'Aries*, 22 Vet. App. at 105.

Service Connection for Sleep Apnea

Generally, service connection may be established for a disability resulting from disease or injury incurred in or aggravated by active service. 38 U.S.C.A. §§ 1110, 1131; 38 C.F.R. § 3.303. To establish service connection for a disability, the Veteran must show: (1) the existence of a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the current disability and the disease or injury incurred in or aggravated during service. *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004).

A disability which is proximately due to or the result of a service-connected disease or injury shall be service connected. When service connection is thus established for a secondary condition, the secondary condition shall be considered a part of the original condition. 38 C.F.R. § 3.310(a). Any increase in severity of a nonservice-

connected disease or injury that is proximately due to or the result of a service-connected disease or injury, and not due to the natural progress of the nonservice-connected disease, will also be service connected. 38 C.F.R. § 3.310(b).

The Veteran contends that he has sleep apnea that is caused by or proximately due to his service-connected PTSD with major depressive disorder. In November 2016, the Veteran's representative submitted abstracts for articles from the National Institute of Health website that she asserts, "authoritatively show a causal link between combat-related PTSD and sleep apnea. Such articles should provide sufficient evidence to warrant service connected compensation." The Veteran has not put forth any other theory as to how his sleep apnea is related to his active service.

The VA treatment records indicate that the Veteran was diagnosed with sleep apnea based on a sleep study, and uses continuous positive airway pressure (CPAP) therapy for the condition. As such, there is competent evidence of a current disability of sleep apnea.

The Veteran's service treatment records are silent for any complaints of or treatment for sleep difficulties. The Veteran denied current symptoms or history of frequent trouble sleeping on reports of medical history dated in December 1970, August 1981, December 1985, March 1989, and July 1993. The Veteran does not contend that his sleep apnea had its onset during his active service or is otherwise directly related to his active service. Accordingly, the Board finds that there is no indication in the record that the Veteran's sleep apnea had its onset during his active service or is otherwise directly related to his active service.

Therefore, the question remaining for consideration is whether the Veteran's sleep apnea is proximately due to, the result of, or aggravated by his service-connected PTSD with major depressive disorder such that service connection may be awarded under the provisions of 38 C.F.R. § 3.310. To address this question, the Board turns to the competent medical evidence of record. The relevant, competent evidence of record pertinent to this question consists of the opinions provided by the March 2014 and January 2016 VA examiners.

The March 2014 VA examiner reviewed the record and interviewed the Veteran. He noted the Veteran's treatment records showing a diagnosis of sleep apnea and treatment using CPAP therapy. He opined that the sleep apnea is less likely than not proximately due to or the result of the Veteran's service-connected conditions. As a rationale for the opinion, the examiner explained that the pathophysiology of obstructive sleep apnea is characterized by the collapse of the pharyngeal airway, which leads to reduction or cessation of airflow. The severity of obstructive sleep apnea is influenced by airway anatomy, arousal threshold, body habitus, and stability of the respiratory system. Other risk factors for sleep apnea include age, male gender, obesity, craniofacial abnormalities, nasal congestion, and smoking. Prevalence of sleep apnea increases with chronic lung disease, congestive heart failure, end-stage renal disease, acromegaly, and hypothyroidism. The examiner further opined that the Veteran's sleep apnea was not at least as likely as not aggravated beyond its natural progression by his service-connected disabilities. However, in his rationale for that opinion, the examiner stated, "at the current time with the objective data and the patient's subjective report of sleep hygiene, the Veteran's service connection PTSD . . . does aggravate or increase severity of the apnea."

Given the contradictory statements in the March 2014 VA examiner's opinion as to secondary aggravation of the Veteran's sleep apnea by his service-connected PTSD, the case was referred to a second VA examiner in January 2016 to clarify whether it is at least as likely as not that the Veteran's sleep apnea is caused or aggravated by his PTSD. The January 2016 VA examiner also reviewed the record and interviewed the Veteran. He indicated that he reviewed clinical literature and found no accepted clinical reasoning or research to suggest the PTSD causes obstructive sleep apnea. As to aggravation or complication of obstructive sleep apnea by PTSD, the examiner noted that there is some opinion that obesity-induced obstructive sleep apnea can be aggravated by compulsive eating or other eating abnormalities with psychogenic cause. However, this does not appear to be the case here, as the Veteran's weight is not extreme and his body mass index is not at a level that might produce airway restriction. In that regard, the Board notes that the evidence does not show that the Veteran's PTSD has manifested in compulsive

eating or other eating abnormalities. Accordingly, the examiner opined that it is less likely than not that the Veteran's sleep apnea is aggravated or complicated by his PTSD.

The Board affords great probative weight to the March 2014 and January 2016 VA examiners' opinions as to the likely etiology of the Veteran's sleep apnea. The examiners reviewed the record, interviewed the Veteran, and provided appropriate rationale for the opinions given, supported by discussions of the record and relevant medical literature. *See Guerrieri v. Brown*, 4 Vet. App. 467, 470-71 (1993); *see also Nieves-Rodriguez v. Peake*, 22 Vet. App. 295 (2008) (the probative value of a medical opinion is derived from a factually accurate, fully articulated, and soundly reasoned opinion); *Prejean v. West*, 13 Vet. App. 444, 448-9 (2000) (the thoroughness and detail of a medical opinion is a factor in assessing the probative value of the opinion). Although the March 2014 VA examiner provided contradictory statements regarding the likelihood that the Veteran's sleep apnea may be aggravated by his service-connected PTSD, the January 2016 VA examiner provided an adequate opinion and rationale to clarify whether such is the case. The Board therefore accepts the March 2014 and January 2016 VA examiners' opinions, in the aggregate, as probative evidence that it is not at least as likely as not that the Veteran's sleep apnea is proximately due to, caused by, or aggravated by his service-connected PTSD.

The Board has considered the assertions from the Veteran and his representative that his sleep apnea is caused or aggravated by his PTSD. Neither the Veteran nor his representative has been shown to have the medical training and knowledge necessary to render opinions as to medical matters. As lay witnesses, the Veteran and his representative are competent to provide evidence about what may be witnessed or experienced first-hand, such as difficulty sleeping. *See Layno v. Brown*, 6 Vet. App. 465, 469 (1994); *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007). However, they are not considered competent to medically attribute the sleep apnea to any particular cause or state that the sleep apnea is aggravated by any particular condition, as doing so requires medical knowledge and expertise and falls outside the realm of common knowledge. *See Jandreau*, 492 F.3d at 1376-77. Therefore, their assertions that the Veteran's sleep apnea is

caused or aggravated by the service-connected PTSD with major depressive disorder are not considered competent evidence, and do not weigh against the probative value of the March 2014 and January 2016 VA examiners' opinions.

The Board has also considered the abstracts for articles from the National Institute of Health website submitted by the representative in November 2016. However, the Board disagrees that the abstracts "authoritatively show a causal link between combat-related PTSD and sleep apnea," especially in the Veteran's particular case. Rather, the abstracts refer to general studies that were not focused on the Veteran's particular case, and that indicate that sleep apnea is often a comorbidity of PTSD, that sleep apnea might aggravate PTSD symptoms, and that treatment of comorbid sleep apnea often helps to improve PTSD. They do not state that sleep apnea is caused by or aggravated by PTSD.

Specifically, the abstract for the article "Sleep-disordered breathing in Vietnam veterans with PTSD" states that the objective of the study was "To study the prevalence of sleep-disordered breathing in Vietnam-era veterans." The study resulted in a finding that the veterans' body mass index was significantly associated with apnea hypopnea index, and that there were no significant effects of sleep-disordered breathing or apolipoprotein status on an extensive battery of cognitive tests. The conclusion of the study was that there is a relatively high prevalence of sleep-disordered breathing in the Vietnam-era veterans studied, "which raises the question of to what degree excess cognitive loss in older PTSD patients may be due to a high prevalence of sleep-disordered breathing." Thus, the abstract does not indicate that the study was meant to show a link between PTDS and sleep apnea or that the study led to any conclusions regarding whether sleep apnea is caused by or aggravated by PTSD.

The abstract for the article "A retrospective study on improvements in nightmares and PTSD following treatment for co-morbid sleep-disordered breathing" indicates that the study of chronic nightmare sufferers with co-morbid sleep-disordered breathing found that subjects who maintained treatment for the sleep-disordered breathing reported improved sleep, nightmares, and daytime well-being compared to those who did not maintain such treatment. Among the subjects with PTSD,

those who received treatment for the co-morbid sleep-disordered breathing were more likely to see improvement in PTSD symptoms. The conclusion of the study was that treatment of the co-morbid sleep-disordered breathing was associated with improvements in nightmares and PTSD. The abstract does not indicate that the study led to any conclusions regarding whether sleep apnea is caused by or aggravated by PTSD.

The abstract for the article "Sleep disruptions among returning combat veterans from Iraq and Afghanistan" indicates that the study of active duty soldiers who had recently returned from combat deployment in Iraq or Afghanistan with PTSD, traumatic brain injury, and other conditions found high instances of sleep disturbances among all diagnoses. There was no difference across the diagnostic groups. However, there were more frequent arousals from sleep among patients with PTSD. The conclusion of the study was that sleep disturbances are common among recently redeployed combat veterans, but there were nonspecific findings across primary diagnoses of PTSD, traumatic brain injury, major depression, and anxiety disorder. Subtle differences in sleep architecture and arousals were modestly effective at distinguishing among the diagnostic groups. The abstract does not indicate that the study led to any conclusions regarding whether sleep apnea is caused by or aggravated by PTSD.

The abstract for the article "Obstructive sleep apnea in combat-related PTSD: a controlled polysomnography study" indicates that the objective of the study was to determine whether obstructive sleep apnea was more prevalent among Dutch veterans with PTSD than in age- and trauma-matched controls and whether obstructive sleep apnea was associated with more severe PTSD complaints. The conclusion of the study was that PTSD is not necessarily associated with higher prevalence of obstructive sleep apnea. However, PTSD severity was related to obstructive sleep apnea, which may possibly mean that co-morbid obstructive sleep apnea leads to an increase in PTSD symptoms. In other words, obstructive sleep apnea may aggravate PTSD symptoms. The abstract does not indicate that the study led to any conclusions regarding whether sleep apnea is caused by or aggravated by PTSD.

As such, the abstracts do not provide probative evidence that it is at least as likely as not that the Veteran's sleep apnea is proximately due to, caused by, or aggravated by his PTSD. They do not weigh against the probative value of the March 2014 and January 2016 VA examiners' opinions.

Finally, the Board notes that the Veteran initially submitted a claim for entitlement to service connection for "sleep difficulties" and that the record shows the Veteran has nightmares and insomnia. However, those symptoms have been medically attributed to his service-connected PTSD with major depressive disorder and are compensated through his rating for that disability. As such, there is no need to discuss whether the Veteran is entitlement to service-connected for the sleep difficulties other than sleep apnea.

In view of the foregoing, the Board concludes that the preponderance of the evidence is against the claim for entitlement to service connection for sleep apnea. Because the preponderance of the evidence is against the claim, the benefit-of-the-doubt doctrine is not for application, and the claim must be denied. 38 U.S.C.A. § 5107(b); *see also Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

Earlier Effective Date

The Veteran seeks entitlement to an effective date earlier than March 31, 2011, for the grant of service connection for PTSD. He asserts that an effective date of June 10, 2002, the date of his original claim for service connection is appropriate. He argues that, following the Board's remand of the issue of entitlement to service connection for an acquired psychiatric disorder other than PTSD in February 2010, "when the VA evaluated the facts and evidence regarding [the Veteran's] entitlement to service connection of an acquired psychiatric condition, the evidence would have revealed that [the Veteran] carried an undisputed diagnosis of PTSD and his PTSD was the result of fear of hostile military or terrorist activities" such that, on remand, the Veteran "should have been awarded compensation for PTSD with an effective date going back to the date of his claim." *See* "BVA Memorandum," dated in October 2016.

The effective date for a grant of service connection is the day following the date of separation from active service or the date entitlement arose, if the claim is received within one year after separation from service. Otherwise, the effective date is the date of receipt of the claim, or the date entitlement arose, whichever is later. 38 U.S.C.A. § 5110(a), (b); 38 C.F.R. § 3.400(b). The effective date of service connection based on a reopened claim is the date of receipt of the new claim or date entitlement arose, whichever is later. 38 C.F.R. § 3.400(r).

Regulations that were in effect prior to March 24, 2015, required that an informal claim "must identify the benefit sought." *See* 38 C.F.R. §§ 3.155, 3.160 (2014). The regulations also provided that a claim may be either a formal or informal written communication "requesting a determination of entitlement, or evidencing a belief in entitlement, to a benefit." 38 C.F.R. § 3.1(p) (2014). The regulations in effect since March 24, 2015, do not allow for informal claims that are not submitted on an application form prescribed by the Secretary. *See* 38 C.F.R. §§ 3.155, 3.160 (2015). The Board will apply the regulations in effect prior to March 24, 2015, as they allowed for informal claims and are therefore more favorable to the Veteran.

In this case, the Veteran's submitted an original claim for entitlement to service connection for PTSD in August 2002. *See* VA Form 21-526, Veteran's Application for Compensation and/or Pension, received in August 2002. That claim for service connection for PTSD was denied by the RO in a September 2003 rating decision because the Veteran did not provide information as to in-service stressors sufficient to conduct further research to confirm the incurrence of an in-service stressor. The Veteran timely appealed that decision and, in April 2004, the RO issued a statement of the case as to the issue. Thereafter, the Veteran submitted a timely substantive appeal as to the issue. On February 22, 2010, the Board issued a decision denying the Veteran's claim for entitlement to service connection for PTSD because he did not have PTSD due to a verified in-service stressor. The Veteran did not file a motion for reconsideration of the February 2010 Board decision. The Veteran also did not appeal the issue to the Court of Appeals for Veterans Claims (Court) within the prescribed period of time. Accordingly, the February 2010 Board decision is final. *See* 38 U.S.C.A. § 7104; 38 C.F.R. § 20.1100.

There is no evidence of record received between February 22, 2010, and March 31, 2011, that can be reasonably construed as a formal or informal claim to reopen the previously denied claim for entitlement to service connection for PTSD.

On March 31, 2011, VA received correspondence from the Veteran requesting that his claim for entitlement to service connection for PTSD be reopened "under the new criteria." Correspondence from the Veteran's representative received on the same date clarified that the Veteran was seeking entitlement to service connection for PTSD based on changes to 38 C.F.R. § 3.304(f) that allowed for establishment of an in-service stressor based on a Veteran's lay testimony alone where the stressor claimed is related to the Veteran's fear of hostile military terrorist activity, a VA psychiatrist or psychologist confirms that the claimed stressor is adequate to support a diagnosis of PTSD, and the stressor is consistent with the places, types, and circumstances of the Veteran's service.

In a May 1, 2013 rating decision, the RO denied entitlement to service connection for PTSD. However, on May 9, 2013, a VA physician provided an opinion that the Veteran meets the criteria under 38 C.F.R. § 3.304(f)(3), relating to in-service stressors based on fear of hostile military or terrorist activity, for establishment of the occurrence of the in-service stressor based on the Veteran's lay testimony alone. On May 10, 2013, the RO issued another rating decision granting entitlement to service connection based on the May 9, 2013 VA opinion. The May 10, 2013 rating decision established an effective date of March 31, 2011, for the grant of service connection for PTSD.

As noted above, the effective date for the grant of service connection will be the date of receipt of the petition to reopen or the date entitlement arose, whichever is later. 38 C.F.R. § 3.400(r). Thus, in this case the Veteran is not entitled to an effective date prior to March 31, 2011, the date of receipt of the petition to reopen the previously denied claim.

The Board notes that the Veteran's claim for entitlement to service connection for PTSD was eventually granted under a change to the regulations governing entitlement to service connection for PTSD. The amended version of 38 C.F.R.

§ 3.304(f) relaxed the evidentiary standard required for establishing an in-service stressor to support a diagnosis of PTSD. 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. 38 U.S.C.A. § 5110(g); 38 C.F.R. §§ 3.114, 3.400(p). 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. *See* Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed. Reg. 39843, 39851 (July 13, 2010). Therefore, the Veteran may not be awarded an effective date prior to March 31, 2011, for the grant of service connection for PTSD based on the amendments to 38 C.F.R. § 3.304(f) under 38 U.S.C.A. § 5110(g) and 38 C.F.R. § 3.114.

Furthermore, the amendments to 38 C.F.R. § 3.304(f) apply only to claims pending at the time of the effective date of the regulations, which is July 13, 2010. *See* Stressor Determinations for Posttraumatic Stress Disorder, 75 Fed. Reg. 39843, 39850-51 (July 13, 2010). The Board denied the Veteran's original claim for entitlement to service connection for PTSD on February 22, 2010. Therefore, that claim was not pending as of July 13, 2010, and the amendments to 38 C.F.R. § 3.304(f) do not apply to that claim.

The Board acknowledges the representative's statements in her October 2016 "BVA Memorandum" asserting that the Veteran is entitled to an earlier effective date for the grant of service connection for PTSD based on his claim for entitlement to service connection for a psychiatric disability other than PTSD. In its February 22, 2010 decision the Board did remand the issue of entitlement to service connection for a psychiatric disorder other than PTSD. However, as discussed above, the Board denied the Veteran's claim for entitlement to service connected for PTSD in February 2010. The denial of entitlement to service connection for PTSD became final because the Veteran did not file a motion for reconsideration as to the issue or appeal the issue to the Court within the prescribed period of time. As such, there was no active claim for entitlement to service connection for PTSD from February 22, 2010, to March 31, 2011. Any evidence showing "an undisputed diagnosis of PTSD" that was "the result of fear of hostile military or terrorist activities" that was developed or received prior to March 31, 2011, in conjunction

with the remanded issue of entitlement to service connection for an acquired psychiatric disability other than PTSD does not serve as a basis for awarding an effective date prior to March 31, 2011, for the grant of service connection for PTSD.

To the extent that the Veteran and his representative assert that the Veteran is entitled to an effective date based on his earlier claim for service connection, the Board reiterates that this claim was denied by the Board in February 2010. The Veteran did not file a motion for reconsideration as to the issue or appeal the issue to the Court within the prescribed period of time, and there has been no adjudicatory finding of CUE in the Board decision or the September 2003 rating decision denying entitlement to service connection for PTSD. Therefore, those decisions are final. 38 U.S.C.A. § 7105; 38 C.F.R. §§ 20.200, 20.302, 20.1103. As such, the earlier claim may not serve as a basis for an earlier effective date. Furthermore, the Court has held that there is no basis in VA law for a freestanding claim for an earlier effective date for matters addressed in a final decision. Rather, when a decision is final, only a request for a revision premised on CUE may result in the assignment of an earlier effective date based on the earlier claim. *See Rudd v. Nicholson*, 20 Vet. App. 296 (2006). Consequently, the Board concludes that the attempt to overcome the finality of the September 2003 rating decision and February 2010 Board decision by raising a freestanding claim for entitlement to an earlier effective date in conjunction with the present claim must fail. The Board's finding in this regard does not prejudice any future adjudication of the issue of CUE in the September 2003 rating decision, which was raised in the record and is referred to the AOJ herein.

Finally, the Board notes that additional service records were associated with the record following the Board's February 2010 denial of entitlement to service connection for PTSD. An earlier effective date may be warranted on the basis of newly discovered service department records. Specifically, VA will reconsider the claim where relevant official service department records that existed and had not been associated with the record when VA first decided the claim are received or otherwise associated with the record. 38 C.F.R. § 3.156(c). However, in this case the service records received following the Board's February 2010 decision are not

relevant to the issue of entitlement to service connection for PTSD. Furthermore, the Veteran was eventually granted entitlement to service connection for PTSD based on amendments to 38 C.F.R. § 3.304(f) made effective following the February 2010 Board decision, and not based on newly acquired service records.

In summary, there is no indication in the record that the September 2003 rating decision or February 2010 Board decision denying the original claim for entitlement to service connection for PTSD is not final. The Veteran's petition to reopen the finally denied claim for entitlement to service connection for PTSD was received on March 31, 2011. There is no communication from the Veteran between the February 2010 Board decision and the March 31, 2011 petition to reopen that may be construed as a formal or informal petition to reopen the previously denied claim. Therefore, March 31, 2011, the date VA received the Veteran's petition to reopen the previously denied claim, is the appropriate effective date. 38 C.F.R. § 3.400(q)(2). Accordingly, the Board finds that the preponderance of the evidence is against the assignment of an effective date earlier than March 31, 2011, for the grant of entitlement to service connection for PTSD, and the claim must be denied.

ORDER

Entitlement to service connection for sleep apnea is denied.

Entitlement to an effective date earlier than March 31, 2011, for the grant of service connection for PTSD is denied.

REMAND

Service Connection for Joint Disorder

The Veteran asserts that he has joint disorders of the left hip, left knee, and left ankle that are etiologically related to his active service or are secondary to or aggravated by his service-connected low back disability. An April 2014 VA

examiner diagnosed the Veteran with bilateral hip early degenerative joint disease. A January 2016 VA examiner diagnosed the Veteran with osteoarthritis of the left hip, left knee arthritis, and left ankle arthritis. Therefore, there is evidence of current left hip, left knee, and left ankle joint disorders.

The April 2014 VA examiner reviewed the record and examined the Veteran. He opined that it is not at least as likely as not that the Veteran's left hip, knee, and ankle joint disorders is etiologically related to either of the Veteran's periods of active service, caused by the Veteran's service-connected low back disability, or aggravated by the Veteran's service-connected low back disability. As a rationale for the opinion, the examiner stated, "no history or evidence of chronic joint problems or back problems" in the Veteran's service treatment records, and noted March 1989 and July 1993 period examinations that were considered normal.

The January 2016 VA examiner also reviewed the record and examined the Veteran. He opined that it is less likely as not that any identified disorder of the left hip, knee, and ankle was caused or aggravated by the Veteran's service-connected low back disability. As a rationale for the opinion, the examiner explained that the Veteran's service treatment records are silent for diagnoses of such disorders. In addition, they are silent for complaints of such disorders on reports of medical history. They also do not reflect physical restrictions, devices for aid or assistance, or physical profiles. Furthermore, the Veteran denied failing any physical fitness testing or being restricted from being able to perform any physical activity while in service.

Because the January 2016 VA examiner's rationale as to secondary service connection reflects consideration only of the Veteran's time in service, the examiner was asked to provide an addendum opinion. In a March 2016 VA addendum opinion, the January 2016 VA examiner stated that the Veteran's chronic joint complaints are most likely caused by and related to is his post-service civilian job working for the post office, which was physically and mentally demanding. In that regard, the examiner noted complaints of mental and physical difficulties working at the post office dating back to 1998. As to secondary aggravation, the examiner noted that the Veteran has very minor early arthritic changes to the left hip, and that

if the conditions were aggravated from any condition in the service, the extent and degree of arthritis would be severe at 28 years post military career.

The Board finds that the VA examinations and addendum opinions of record are not adequate for decision-making purposes. Specifically, the VA opinions of record as to the question of secondary aggravation of the left hip, knee, and ankle conditions by the service-connected low back disability are not supported by adequate rationale. Specifically, the April 2014 VA examiner's negative opinions and the January 2016 VA examiner's January 2016 negative opinions as to secondary aggravation reflect consideration only of the Veteran's time in service. In addition, the March 2016 addendum opinion as to secondary aggravation of the Veteran's left hip disability again reflects consideration only of the Veteran's time in service, as the examiner references the arthritis being aggravated from any condition "in the service." Furthermore, the Board notes that the VA examiner's statements in the March 2016 addendum opinions that the Veteran's chronic joint complaints are most likely caused by or "related to" his post-service civilian occupation does not adequately address the question of aggravation. *See El-Amin v. Shinseki*, 26 Vet. App. 136, 140-41 (2013). Therefore, the matter must be remanded so that adequate opinions may be obtained. *See Barr v. Nicholson*, 21 Vet. App. 303, 312 (2007).

Increased Rating for Service-Connected Low Back Disability

The Veteran most recently underwent examination as to the service-connected low back disability in August 2013. The report for that examination includes range-of-motion measurements for the Veteran's thoracolumbar spine, to include descriptions of where objective evidence of painful motion begins. However, the report does not specify whether the range-of-motion measurements were taken on active motion, on passive motion, on weight-bearing, or on nonweight-bearing. In addition, the examiner did not indicate that he was unable to perform range-of-motion testing on active, passive, weight-bearing, and nonweight-bearing or that such testing was not necessary. Therefore, the examination report does not make clear the extent to which pain affects the Veteran's passive, active, weight-bearing, and nonweight-bearing motion. The final sentence of 38 C.F.R. § 4.59 provides, in relevant part, that "[t]he joints involved should be tested for pain on both active and

passive motion, in weight-bearing and nonweight-bearing . . . ." Therefore, to be adequate for rating purposes, an examination of the joints must, whenever possible, include the results of the range-of-motion testing described in the final sentence of 38 C.F.R. § 4.59. *See Correia v. McDonald*, 28 Vet. App. 158 (2016). In this case, the August 2013 examination report does not include range-of-motion testing on active, passive, weight-bearing, and nonweight-bearing or a statement to the effect that such testing was not possible or unnecessary in this case. Furthermore, the examiner noted that the Veteran was unable to perform repetitive-use testing because "[h]is pain gets worse with repetitive range of motion, and he states he gets fatigued and is unable to do it." The examiner opined that the Veteran has additional limitation in range of motion of the thoracolumbar spine following repetitive-use testing. However, the examiner also opined later in the report that the Veteran had no additional limitation of motion when the joint is used repeatedly over a period of time. Accordingly, the Veteran must be afforded a new VA thoracolumbar spine examination that includes all of the necessary information as set forth in 38 C.F.R. § 4.59 and that clarifies whether the Veteran experiences or likely experiences additional functional loss due to repetitive use over time.

Increased Rating for Service-Connected Peripheral Neuropathy of the Bilateral Lower Extremities

The Veteran has not yet been provided a VA examination specifically addressing the nature and severity of his service-connected peripheral neuropathies of the bilateral lower extremities. Rather, his current ratings appear to be based on a December 2010 EMG/Nerve Conduction Study, which showed mild, distal sensorimotor axonal polyneuropathy and a superimposed moderately severe left sciatic neuropathy. The December 2010 EMG/Nerve Conduction Study report does not include all of the information necessary to rate the Veteran's service-connected peripheral neuropathies of the bilateral lower extremities. *See* 38 C.F.R. § 4.124a, Diagnostic Code 8520. Therefore, it is not adequate for rating purposes, and the Veteran must be provided a VA examination to determine the current nature and severity of his service-connected peripheral neuropathies of the bilateral lower extremities.

Increased Rating for Service-Connected Radiculopathy of the Left Lower Extremity

The Veteran's service-connected low back disability is rated under 38 C.F.R. § 4.71a, Diagnostic Code 5237. Note (1) under that diagnostic code directs the rating authority to "[e]valuate any associated objective neurologic abnormalities . . . separately, under an appropriate diagnostic code." As the Veteran's service-connected radiculopathy of the left lower extremity is associated with the service-connected low back disability, the Board must remand the appeal for an increased initial rating for the service-connected radiculopathy along with the appeal for a higher initial rating for the service-connected low back disability so that it may be further evaluated pursuant to 38 C.F.R. § 4.71a, Diagnostic Code 5237, Note (1). The examiner who conducts the examination as to the Veteran's service-connected low back disability should be instructed also to provide findings sufficient to rate the Veteran's service-connected radiculopathy of the left lower extremity.

Increased Rating for Service-Connected Headaches

The Veteran was most recently provided an examination as to his service-connected headaches in August 2013. The August 2013 VA examination report reflects that the Veteran's headaches lasted less than a day, were treated with Tylenol, and were not associated with aura, sensitivity to light or sound, or other such symptoms. The examiner indicated that the Veteran did not have characteristic prostrating attacks of migraine headache pain or of non-migraine headache pain. In a November 2016 memorandum, the Veteran's representative asserts that the Veteran has severe migraine headaches almost daily, and that the Veteran meets the requirements for a 50 percent rating under 38 C.F.R. § 4.124a, Diagnostic Code 8100. In light of the representative's assertions, the Board finds that a new VA examination is required so that the current nature and severity of the Veteran's service-connected headaches may be determined. *See* 38 U.S.C.A. § 5103A; 38 C.F.R. § 3.159; *see also Green v. Derwinski*, 1 Vet. App. 121, 124 (1991) (VA has a duty to provide the veteran with a thorough and contemporaneous medical examination); *Weggenmann v. Brown*, 5 Vet. App. 281 (1993) (VA has a duty to provide an examination when there is evidence that the disability has worsened since the previous examination).

Increased Rating for PTSD with Major Depressive Disorder

Recent VA treatment records reflect that the Veteran attended group therapy and couples therapy at the Orlando Vet Center and the Clermont Vet Center in Florida during the relevant rating period. Records pertaining to that therapy have not yet been associated with the record. VA treatment records, even if not associated with the record, are considered part of the record on appeal because they are within VA's constructive possession. *See* 38 U.S.C.A. § 5103A; *Bell v. Derwinski*, 2 Vet. App. 611 (1992). Accordingly, the appeal for an increased rating for PTSD with major depressive disorder must be remanded so that records of the Veteran's group therapy and couples therapy at the Orlando Vet Center and the Clermont Vet Center may be obtained and associated with the record.

TDIU

The outcome of the Veteran's service connection and increased rating appeals that are remanded herein could have a significant impact on the TDIU issue. As such, the TDIU issue is inextricably intertwined with the other issues herein remanded. *See Harris v. Derwinski*, 1 Vet. App. 180, 183 (1991) (holding that where a decision on one issue would have a "significant impact" upon another, and that impact in turn could render any appellate review on the other claim meaningless and a waste of judicial resources, the two claims are inextricably intertwined). Therefore, the Board finds that the service connection and increased rating appeals must be adjudicated by the AOJ prior to appellate consideration of entitlement to a TDIU.

Accordingly, the case is REMANDED for the following action:

> 1. Obtain all outstanding VA treatment records relevant to the matters being remanded, specifically to include records of the Veteran's group therapy and couples therapy at the Orlando Vet Center and the Clermont Vet Center in Florida, and associate them with the record.

2. Forward the record and a copy of this Remand to a VA clinician qualified to provide the opinions requested below. Further in-person examination of the Veteran is left to the discretion of the clinician selected. The examiner must review the record and address the following:

a) Provide an opinion as to whether it is *at least as likely as not* (50 percent probability or greater) that the Veteran's left hip, left knee, and/or left ankle condition was proximately due to or the result of the Veteran's service-connected disabilities, specifically to include the service-connected low back disability.

b) If not, provide and opinion as to whether it is *at least as likely as not* (50 percent probability or greater) that the Veteran's left hip, left knee, and/or left ankle condition was aggravated by the Veteran's service-connected disabilities, specifically to include the service-connected low back disability.

Aggravation is defined as a permanent worsening beyond the natural progression of the disease.

The examiner must indicate that the record was reviewed. The examiner should note that an opinion to the effect that one disability "is not caused by or a result of" another disability does not answer the question of aggravation and will require a further opinion. *See El-Amin v. Shinseki*, 26 Vet. App. 136, 140-41 (2013).

A complete rationale should be provided for any opinion given. The examiner's rationale should reflect consideration of the Veteran's post-service medical

history. Specifically in regard to the question of secondary aggravation, the examiner should note that the Veteran's left hip, left knee, and/or left ankle condition need not have been aggravated by the service-connected low back disability during his active service. Thus, any opinion given should reflect consideration of the possibility that the Veteran's left hip, left knee, and/or left ankle joint condition may have been aggravated by the service-connected low back disability at some point after the Veteran's separation from active service.

3. Schedule the Veteran for a VA examination to determine the current nature and severity of his service-connected low back disability. The examination should include all studies, tests, and evaluations deemed necessary by the examiner. The examiner should report all manifestations related to the service-connected low back disability. The record and a copy of this Remand must be made available to and reviewed by the examiner. The examiner must address the following:

a) Pursuant to *Correia v. McDonald*, 28 Vet. App. 158 (2016), and 38 C.F.R. § 4.59 (2015), the examiner should record the results of range-of-motion testing for pain on **both** active and passive motion **and** in weight-bearing and nonweight-bearing. If the examiner is unable to conduct the required testing or concludes that the required testing is not necessary in this case, he or she should clearly explain why that is so. The examination results should be recorded using VA Form 21-0960M-14, May 2013, Back (Thoracolumbar Spine) Conditions Disability Benefits Questionnaire (DBQ), or a more recent revision of that DBQ, if possible.

In recording the ranges of motion for the Veteran's thoracolumbar spine, the examiner should note whether, upon repetitive motion, there is any pain, weakened movement, excess fatigability, or incoordination of movement, and whether there is likely to be additional functional loss due to pain on use, weakened movement, excess fatigability, or incoordination over time. The examiner should also indicate whether the Veteran experiences additional functional loss during flare-ups of the service-connected low back disability. If there is no pain, no limitation of motion, and/or no limitation of function, such facts must be noted in the report.

b) The examiner should also express an opinion concerning whether there would be additional functional impairment on repeated use or during flare-ups. The examiner should assess the additional functional impairment on repeated use or during flare-ups in terms of the degree of additional range-of-motion loss. If this is not feasible to determine without resort to speculation, the examiner must provide an explanation for why this is so.

c) Conduct neurological testing to assess the nature and severity of the Veteran's service-connected radiculopathy of the left lower extremity that is associated with the service-connected low back disability.

d) Provide a description of the functional impact of the Veteran's service-connected low back disability, to include a description of how the disability affects or likely affects his ability to perform work and work-like tasks. For example, indicate the extent to which the disability affects his ability to sit, stand, and/or walk; lift and/or

carry; and perform postural activities such as bending, kneeling, and crouching.

The examiner must note that the record was reviewed. The examiner must provide a complete rationale for any opinion expressed.

4. Schedule the Veteran for a VA neurological examination to ascertain the current nature and severity of the Veteran's service-connected peripheral neuropathies of the bilateral lower extremities. The record must be made available to and reviewed by the examiner. The examiner should undertake any evaluation and/or testing deemed necessary, including EMG and nerve conduction studies.

The examiner must specifically state whether any neurologic manifestation found results in complete or incomplete paralysis of any nerve. The specific nerves involved must be identified. If incomplete paralysis is found, the examiner must state whether the incomplete paralysis is best characterized as mild, moderate, moderately severe, or severe. If the incomplete paralysis is severe, the examiner should further note whether there is marked muscular atrophy.

If no signs or symptoms due to the service-connected neuropathies are found, the examiner must specifically discuss the Veteran's complaints of numbness and radicular pain found in the record and attempt to reconcile any conflicting medical opinion showing such symptoms, to include the finding of moderate radiculopathy involving the left sciatic nerve in the August 2013 examination report.

The examiner should also provide a description of the functional impact of the Veteran's service-connected neuropathies of the bilateral lower extremities, to include a description of how the disabilities affect or likely affects his ability to perform work and work-like tasks.

5. Schedule the Veteran for a VA examination to determine the current nature and severity of his service-connected headaches. The record and a copy of this Remand must be made available to the examiner. The examiner is to perform all indicated tests and examinations necessary for a complete evaluation of the disability. All findings must be reported in detail, and an adequate rationale must be provided for each opinion given.

In so doing, the examiner must acknowledge and discuss the Veteran's reported headache symptoms. The headaches examination must include a report of all pertinent findings to include a description of all symptomatology associated with the service-connected headaches. The examiner must comment as to the nature and frequency of the Veteran's headaches and state whether they are characteristic prostrating attacks. If they are characteristic prostrating attacks, the examiner must estimate the average number of such attacks over the last several months, and describe the length and severity of such attacks. The examiner must identify any other residual symptoms associated with the service-connected headaches and their disease process.

> The examiner should also provide an opinion as to the impact the Veteran's service-connected headaches have on his ability to work.
>
> 6. After completion of the above, review the expanded record, including the evidence entered since the most recent adjudications of the issues remaining on appeal, and determine whether the benefits sought may be granted. In so doing, determine whether a TDIU may be granted, to include, if warranted, referral of the matter of whether a TDIU should be awarded on an extra-schedular basis, pursuant to 38 C.F.R. § 4.16(b), to the Director of the Compensation and Pension Service during any period in which the schedular requirements of 38 C.F.R. § 4.16(a) were not met. If any benefit sought remains denied, furnish the Veteran and his representative with a supplemental statement of the case. A reasonable period should be allowed for response before the appeal is returned to the Board.

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

This claim must be afforded expeditious treatment. The law requires that all claims that are remanded by the Board of Veterans' Appeals or by the United States Court of Appeals for Veterans Claims for additional development or other appropriate action must be handled in an expeditious manner. *See* 38 U.S.C.A. §§ 5109B, 7112 (West 2014).

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MICHAEL MARTIN
Veterans Law Judge, Board of Veterans' Appeals

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (BVA or Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. We will return your file to your local VA office to implement the BVA's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. None of these things is mutually exclusive - you can do all five things at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court ***before*** you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

How long do I have to start my appeal to the court? You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you,* you will have another 120 days from the date the BVA decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time*. Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

How do I appeal to the United States Court of Appeals for Veterans Claims? Send your Notice of Appeal to the Court at:

Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: http://www.uscourts.cavc.gov, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office.

How do I file a motion for reconsideration? You can file a motion asking the BVA to reconsider any part of this decision by writing a letter to the BVA clearly explaining why you believe that the BVA committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that such letter be as specific as possible. A general statement of dissatisfaction with the BVA decision or some other aspect of the VA claims adjudication process will not suffice. If the BVA has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified will not be considered. Send your letter to:

Director, Management, Planning and Analysis (014)
Board of Veterans' Appeals
810 Vermont Avenue, NW
Washington, DC 20420

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to vacate? You can file a motion asking the BVA to vacate any part of this decision by writing a letter to the BVA stating why you believe you were denied due process of law during your appeal. *See* 38 C.F.R. 20.904. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error? You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address above for the Director, Management, Planning and Analysis, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400 -- 20.1411, and *seek help from a qualified representative before filing such a motion.* See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

How do I reopen my claim? You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. *See* 38 C.F.R. 3.156(a).

Can someone represent me in my appeal? Yes. You can always represent yourself in any claim before VA, including the BVA, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: http://www.va.gov/vso/. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before the VA, you can get information on how to do so at the Court's website at: http://www.uscourts.cavc.gov. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: http://www.vetsprobono.org, mail@vetsprobono.org, or (855) 446-9678.

Do I have to pay an attorney or agent to represent me? An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. *See* 38 C.F.R. 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

Fee for VA home and small business loan cases: An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

Filing of Fee Agreements: In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to the Secretary at the following address:

Office of the General Counsel (022D)
810 Vermont Avenue, NW
Washington, DC 20420

The Office of General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of General Counsel. *See* 38 C.F.R. 14.636(i); 14.637(d).