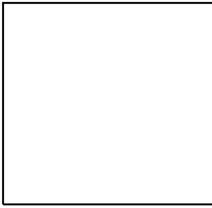

BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF
ALLEN D. GOODMAN

DOCKET NO. 10-18 756) DATE June 7, 2017
) KK
)

On appeal from the
Department of Veterans Affairs Regional Office in Phoenix, Arizona

THE ISSUES

1. Entitlement to service connection for a right knee disability.

2. Entitlement to service connection for a left knee disability.

3. Entitlement to service connection for a right elbow disability.

REPRESENTATION

Appellant represented by: Disabled American Veterans

WITNESS AT HEARING ON APPEAL

The Veteran

ATTORNEY FOR THE BOARD

A. Parsons, Associate Counsel

INTRODUCTION

The Veteran served on active duty from July 2005 through October 2006.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from an October 2007 rating decision issued by a Department of Veterans Affairs (VA) Regional Office (RO).

The Veteran appeared before the undersigned Veterans Law Judge (VLJ) in a July 2014 Travel Board hearing. A transcript is of record.

In an April 2016 decision, the Board remanded the above-listed claims for further development. That development having been completed to the extent possible, the matter is again before the Board for further appellate consideration.

The Board also remanded claims for an increased rating for a mood disorder and total disability based on individual unemployability in order to provide the Veteran a Statement of the Case. The Remand notified him that these claims would be returned to the Board only if he filed a timely substantive appeal. The Statement of the Case was mailed to him on May 18, 2016, and the accompanying notice properly informed him of the time limits within which he had to file an appeal. Since more than a year had already passed since these claims were denied in a 2013 rating decision, his appeal had to be received within 60 days. A VA Form 9 was received on August 1, showing a signature from the Veteran on July 28, and a second VA Form 9 was received August 15, showing a signature from the Veteran on August 11.

Both these substantive appeals were untimely in that they were submitted more than 60 days after the Statement of the Case. The Veteran had until July 18, 2016, and

the first VA Form 9 was signed by him 10 days after the appeal period had already expired. The Board has considered that a substantive appeal is not a jurisdictional requirement, and VA may waive any issue of timeliness in the filing of a substantive appeal, either explicitly or implicitly, where appropriate. *Percy v. Shinseki*, 23 Vet. App. 37 (2009). However, in this case, the Veteran has not been led to believe by the RO that these issues were on appeal to the Board, either explicitly or implicitly. In fact, the Veteran's substantive appeal was determined to be untimely by the RO, and the matters were closed within VA's appeals tracking system. Thus, the circumstances present in *Percy*, where the RO acted as if the substantive appeal had been timely, are not present here. On this record, the Board declines to exercise its discretion to waive the untimeliness of the Veteran's substantive appeal and, so, will not address the merits of the claims. *Percy*, 23 Vet. App. at 46 ("the Board may decline to exercise jurisdiction over the appeal as a prudential matter"). **However, the RO should notify him that these appeals were untimely, as that is an appealable determination**.

Further, the Board notes the Veteran, in his August 15, 2016 VA Form 9, argued that his right elbow disability claim should be a claim for a bilateral elbow disability. This appeal has been ongoing for 11 years, and consistently adjudicated as only the right elbow. The Veteran did not raise the left elbow as a possible issue until 2016. Effective on and after March 24, 2015, VA updated the regulations concerning the filing of claims. 79 Fed. Reg. 57,660 (Sept. 24, 2014) (codified in 38 C.F.R. Parts 3, 19, and 20 (2015)). In part, the Department replaced the informal/formal claims process with a standardized and more formal process. *See* 79 Fed. Reg. at 57,663-64; *see also* 38 C.F.R. § 3.155 (2015). As a result of the rulemaking, a complete claim on an application form is required for all types of claims. 38 C.F.R. § 3.155(d). A claimant who wants to file for benefits under laws administered by VA but does not communicate that desire on a prescribed VA Form (on paper or electronically) is not considered to have filed a claim. 38 C.F.R. § 3.150(a). Instead, that person is considered to have requested an application form. *Id*. **It does not appear the Agency of Original Jurisdiction (AOJ) responded to this request, and it is referred to the AOJ for appropriate action**.

FINDINGS OF FACT

1. The Veteran's right knee disability is not etiologically linked to his active duty service, to include as secondary to his service-connected back disability.

2. The Veteran's left knee disability is not etiologically linked to his active duty service, to include as secondary to his service-connected back disability.

3. The Veteran's right elbow disability is not etiologically linked to his active duty service.

CONCLUSIONS OF LAW

1. The criteria for service connection for a right knee disability have not been met. 38 U.S.C.A. §§ 1101, 1110, 1112, 1113, 1137, 1154, 5107 (West 2014); 38 C.F.R. §§ 3.102, 3.303, 3.307, 3.309, 3.310 (2016).

2. The criteria for service connection for a left knee disability have not been met. 38 U.S.C.A. §§ 1101, 1110, 1112, 1113, 1137, 1154, 5107 (West 2014); 38 C.F.R. §§ 3.102, 3.303, 3.307, 3.309, 3.310 (2016).

3. The criteria for service connection for a right elbow disability have not been met. 38 U.S.C.A. §§ 1110, 1154, 5107 (West 2014); 38 C.F.R. §§ 3.102, 3.303 (2016).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

I. Duty to Notify and Assist

VA has a duty to provide notification to the Veteran with respect to establishing entitlement to benefits, and a duty to assist with development of evidence under 38 U.S.C.A. §§ 5103, 5103A; 38 C.F.R. § 3.159(b). The duty to notify was satisfied prior to the initial RO decision by a December 2006 letter. The claims file contains

relevant service personnel records, VA treatment records, and VA examination reports.

In cases where records once in the hands of the government are lost, the Board has a heightened obligation to explain its findings and conclusions and to consider carefully the benefit-of-the-doubt rule. *See O'Hare v. Derwinski*, 1 Vet. App. 365, 367 (1991); *Pruitt v. Derwinski*, 2 Vet. App. 83, 85 (1992). In this case, the bulk of the Veteran's service medical records are missing. The VA's analysis of the Veteran's appeals must be undertaken with this heightened duty in mind. In this case, because it would appear that the Veteran's service treatment records were lost following a 2009 VA examination, the report of this examination wherein the examiner indicated that he had reviewed the Veteran's claims file must be accorded the appropriate probative weight, as the only medical opinion of record which was informed by review of the service treatment records. As this opinion was rendered with the benefit of the Veteran's service treatment records, the examiner's conclusions must necessarily be viewed as more informed than subsequent reviews, made without access to the Veteran's service treatment records.

It appears that the original request for the Veteran's service treatment records yielded records which did not include his mental health records, as mental health records usually require a separate request. The RO then requested these mental health records directly from the Veteran's squadron. The squadron responded that they could only release mental health records if the Veteran himself signed an authorization for such release. It appears that the Veteran has not done so, and in fact, failed to respond to VA's requests for him to execute a release. As mental health service records may not be relevant to the issues on appeal, their absence is likely not critical to the resolution of the Veteran's appeals.

A review of the file shows that the available service treatment records were provided along with his claims file to the VA Medical Center in Phoenix for review in conjunction with a VA examination. The claims file was not returned to the RO from the Medical Center, and was presumably lost in transit, to include the Veteran's service treatment records. Although the RO has reconstructed most of the contents of the Veteran's claims file, the service treatment records were

apparently original documents and have not been reconstructed. According to a memorandum prepared for the file, the RO did request any copies of the Veteran's service treatment records from the VA's Records Management Center; however, that Center replied that they had conducted a special search but no additional records pertaining to the Veteran had been identified. It is these records which would likely be relevant to the issues on appeal, involving the Veteran's knees and right elbow. However, from the Veteran's testimony and his VA Form 9, he denies seeking medical treatment for the knees and elbow during service, so the missing service treatment records would not contain relevant treatment.

The Board finds the July 2016 VA examination was provided by an examiner with appropriate expertise who thoroughly reviewed the file. This examination is adequate because, along with the other evidence of record, it provided sufficient information to decide the appeal and a sound basis for a decision on the Veteran's claims. 38 C.F.R. § 3.159(c)(4); *Brockway v. McDonald*, 15-377 (2016); *Barr v. Nicholson*, 21 Vet. App. 303 (2007).

Additionally, the Veteran was provided with an opportunity to testify at a hearing before the Board in July 2014. When a VLJ conducts a hearing, she must fulfill two duties. 38 C.F.R. § 3.103(c)(2); *Bryant v. Shinseki*, 23 Vet. App. 488 (2010). These duties consist of (1) the duty to fully explain the issues and (2) the duty to suggest the submission of evidence that may have been overlooked. Here, the undersigned VLJ asked the Veteran questions surrounding his disabilities. The Veteran had an opportunity to provide evidence in addition to his testimony. Finally, the Veteran has not asserted that VA failed to comply with 38 C.F.R. § 3.103(c)(2), nor has he identified any prejudice in the conduct of the July 2014 hearing. As such, the Board finds that, consistent with *Bryant*, the duties set forth in 38 C.F.R. § 3.103(c)(2) have been satisfied.

Therefore, VA has satisfied its duties to notify and assist, and there is no prejudice to the Veteran in adjudicating this appeal. *See Soyini v. Derwinski*, 1 Vet. App. 540, 546 (1991); *Sabonis v. Brown*, 6 Vet. App. 426, 430 (1994).

II. Service Connection

The Board has reviewed all of the evidence in the claims folders. Although the Board has an obligation to provide reasons and bases supporting this decision, there is no need to discuss, in detail, the extensive evidence of record. Indeed, the Federal Circuit has held that the Board must review the entire record, but does not have to discuss each piece of evidence. *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 claim.

The Veteran claims service connection for right and left knee disabilities and a right elbow disability. Specifically, he asserts in a September 2011 statement that he injured his knees and right elbow when moving stoves, fridges and other large equipment up three flights of stairs into a new dorm building.

Service connection may be granted for a disability resulting from a disease or injury incurred in or aggravated by service. *See* 38 U.S.C.A. § 1110 (West 2014); 38 C.F.R. § 3.303(a) (2016). "To establish a right to compensation for a present disability, a Veteran must show: '(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service'-the so-called 'nexus' requirement." *Holton v. Shinseki*, 557 F.3d 1362, 1366 (Fed. Cir. 2010) (quoting *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004)). Disorders diagnosed after discharge will still be service connected if all the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d); *see also Combee v. Brown*, 34 F.3d 1039, 1043 (Fed. Cir. 1994).

In addition, certain chronic diseases, such as arthritis, may be presumed to have been incurred during service if they become manifested to a compensable degree within one year of separation from active duty. 38 U.S.C.A. §§ 1101, 1112, 1113, 1137; 38 C.F.R. §§ 3.307(a)(3), 3.309(a); *see also* 67 Fed. Reg. 67792-67793 (Nov. 7, 2002).

Elements of service connection may also be established by showing continuity of symptomatology under 38 C.F.R. § 3.303(b). Continuity of symptomatology may be shown by demonstrating "(1) that a condition was 'noted' during service or any applicable presumption period; (2) evidence of post-service continuity of the same symptomatology; and (3) medical or, in certain circumstances, lay evidence of a nexus between the present disability and the post-service symptomatology." *Barr v. Nicholson*, 21 Vet. App. 303, 307 (2007); *see also Davidson v. Shinseki*, 581 F.3d 1316; *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007) (holding that "[w]hether lay evidence is competent and sufficient in a particular case is a factual issue to be addressed by the Board"). However, the Federal Circuit held that the theory of continuity of symptomatology can be used only in cases involving those conditions explicitly recognized as chronic in 38 C.F.R. § 3.309(a), such as arthritis. *Walker v. Shinseki*, 708 F.3d 1331 (Fed. Cir. 2013).

Service connection may also be secondary. 38 C.F.R. § 3.310. In the context of claims for secondary service connection, the evidence must demonstrate an etiological relationship between the service-connected disability or disabilities on the one hand and the condition said to be proximately due to the service-connected disability or disabilities on the other. *Buckley v. West*, 12 Vet. App. 76, 84 (1998). Secondary service connection may also be warranted for a nonservice-connected disability when that disability is aggravated by a service-connected disability. *See Allen v. Brown*, 7 Vet. App. 439 (1995) (en banc). Also, with regard to a claim for secondary service connection, the record must contain competent evidence that the secondary disability was caused by the service-connected disability. *See Wallin v. West*, 11 Vet. App. 509 (1998); *Reiber v. Brown*, 7 Vet. App. 513, 516-17 (1995). In each case where a Veteran is seeking service connection for any disability, due consideration shall be given to the places, types, and circumstances of such Veteran's service as shown by the service record, the official history of each organization in which the Veteran served, the Veteran's medical records, and all pertinent medical and lay evidence. 38 U.S.C.A. § 1154(a).

In determining whether service connection is warranted for a disability, VA is responsible for determining whether the evidence supports the claim or is in relative

equipoise, with the Veteran prevailing in either event, or whether a preponderance of the evidence is against the claim, in which case the claim is denied. 38 U.S.C.A. § 5107; 38 C.F.R. § 3.102; *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

The Veteran did not report any knee or elbow pain or specific injury while in service. *See* October 2009 VA examination and Hearing Transcript at 11. The Veteran's Report of Medical Assessment conducted in August 2006 noted the Veteran reported right and left knee pain and elbow pain, but the health care provider notes do not contain any diagnosis of chronic knee or elbow conditions.

In January 2007, the Veteran reported multiple aches and pains, but examination of the upper and lower extremities revealed full ranges of motion and no chronic disabilities were diagnosed. A February 2007 VA treatment record noted the Veteran complained of left knee pain with weight bearing and presented with a slight limp.

The Veteran was afforded a VA examination with regard to his claimed knee and elbow disabilities in October 2009. He reported the pain in his elbow had an onset in 2006 without any specific injury, he did not seek treatment in service, and he was not currently receiving treatment. His elbow pain flared up to moderate pain about twice a week and there was no swelling. With regard to his knees, the Veteran reported his knee pain began in approximately March 2006 without any specific injury. He used no ambulatory aids, and reported no swelling, popping, or cracking. However, he did report that it gave way infrequently and he had fallen once or twice. X-rays taken at the time of the examination showed the Veteran's bilateral knees and right elbow were normal. The examiner found there was no instability with the left knee, but some instability in the right knee with a slightly antalgic gait on the right. The examiner diagnosed the Veteran with a right elbow and bilateral knee strains.

An August 2009 VA treatment record noted the Veteran denied any difficulty ambulating or any deformity when asked about his musculoskeletal system. In July 2010, when asked about musculoskeletal issues, the Veteran reported only his back injury and did not mention any other joint pain.

The record indicates the Veteran next reported bilateral knee pain in June 2010. He was prescribed physical therapy at the time. The Veteran continued to complain of, and be treated for, bilateral knee pain. In January 2011, he reported having "microcompressions" in his knees. Again in March 2011, the Veteran reported having "microfractures" in his knees. In May 2012, the Veteran again reported having "microfractures" to his knees.

In September and October 2011, the Veteran submitted statements from the two service members who supervised him while moving kitchen equipment into the dorm. The letters reported what a difficult and guiling assignment it was.

A June 2012 VA treatment record noted he had crepitus in his knees and elbows. A June 2012 VA treatment record contained the note "knees with pain (mild OA)."

A note contained in an October 2013 VA treatment record recorded the Veteran reported his knee pain was a result of physical stress of the military.

The Veteran appeared before the undersigned VLJ in July 2014 at a Travel Board hearing. During the hearing, he reported he was only given a weight lifting belt for support and a dolly as equipment to drag heavy kitchen equipment up three flights of stairs. Further, he did not report his injuries because he feared losing his security clearance. The Veteran believed his right elbow disability was caused by pulling the heavy equipment up the stairs and the repetitive motion required to accomplish that task. He also raised the argument that his bilateral knee disability was connected secondarily to his service-connected back disability.

MRI reports of the Veteran's knees from December 2014 were unremarkable bilaterally. There was no indication of meniscal tear, osteochondritis dissecans, or chondromalacia in either knee.

The Veteran was afforded a VA medical examination in July 2016 for his claimed knee and elbow disabilities. The VA examiner noted there was no report of either elbow or knee injuries during service. The examiner diagnosed the Veteran with

right elbow lateral epicondylitis. X-rays taken of the right elbow showed no osteoarthritis and were generally unremarkable. The examiner opined that it was less likely than not that the Veteran's right elbow pain was related to service because, although lateral epicondylitis can be caused by heavy lifting, the condition is short term and usually resolves. With regard to his knees, x-rays showed minimal degenerative joint disease bilaterally. The examiner diagnosed the Veteran with mild "patella-femoral syndrome" and opined it was less likely than not that it was caused by moving extremely heavy equipment because that was a one-time event that happened over ten years prior. Further, the Veteran's degenerative changes were consistent with expected development over time.

After a full review of the record in conjunction with the applicable laws and regulations, the Board finds the claims must be denied.

Initially, the record does not reflect the Veteran was diagnosed with osteoarthritis of his knees until July 2012. Therefore, the record does not reflect that the Veteran was diagnosed with arthritis of his knees to a compensable degree within one year of separation from active duty. There is also no evidence showing manifestations of arthritis during or within the first year after service. Thus, the presumptive service connection provision of 38 C.F.R. §§ 3.307(a)(3) and 3.309(a) for chronic disabilities are not applicable.

There is no competent evidence in the record that the Veteran experienced "microcompressions" or "microfractures" to his knees. X-rays taken at the June 2009 VA examination showed that his knees were normal, his December 2014 MRIs were unremarkable, and x-rays taken during his July 2016 VA examination showed only mild degenerative joint disease. The Veteran has never been diagnosed with a fracture to either of his knees.

In his August 2016 VA Form 9, the Veteran argued the fact that he filed his claims the day after he separated from service proves his disabilities existed during service. While the Board recognizes the Veteran's assertions that he currently has right elbow, right knee, and left knee disabilities related to service, and is competent to testify as to events that occurred in military service, the Veteran is not competent to

conclude that this pain is connected to his current diagnoses of minor degenerative joint disease and "patella-femoral syndrome." Although lay persons are competent to provide opinions on some medical issues, the specific disabilities in this case, musculoskeletal issues, fall outside the realm of common knowledge of a lay person. *Kahana v. Shinseki*, 24 Vet. App. 428 (2011); *Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007). Musculoskeletal issues require specialized training and medical diagnostic testing for a determination as to diagnosis, and they are not susceptible of lay opinions on etiology. There are many different possible musculoskeletal issues, and a layperson is not competent to diagnose among them or to provide an etiology. Therefore, the Board finds that the Veteran's statements of record cannot be accepted as competent evidence sufficient to establish service connection for his claimed knee disabilities.

The Board finds the July 2016 VA examiner's opinion to be of great probative value because the conclusion is supported by medical rationale and is consistent with the verifiable facts regarding the Veteran's contentions. *See Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 302-04 (holding that it is the factually accurate, fully articulated, sound reasoning for the conclusion that contributes to the probative value to a medical opinion). As noted above, after considering the Veteran's lay statements, the medical evidence of record, and conducting a full physical examination, the examiner found that the Veteran's right elbow disability and bilateral knee disabilities were not related to his active military service.

With regard to the Veteran's claimed right elbow disability, the examiner opined that it was less likely than not that the Veteran's right elbow lateral epicondylitis was related to service because, although lateral epicondylitis can be caused by heavy lifting, the condition is short term and usually resolves. As for the Veteran's knees, the examiner found his degenerative changes were consistent with expected development over time. The examiner opined the Veteran's patella-femoral syndrome was less likely than not caused by moving extremely heavy equipment because that was a one-time event that happened over ten years prior. The Board finds there is no competent, credible, or persuasive medical evidence of record to refute the July 2016 VA examiner's opinion.

In 2016, the Veteran submitted a statement detailing why he disagreed with the VA examiner's opinion, with information about lifting weights. While it is understandable he disagrees with the negative opinion, it remains the only medical opinion as to whether his claimed conditions are related to service.

Although the July 2016 examiner did not have the Veteran's service treatment records to review, the Veteran has repeatedly stated he did not report any right elbow or knee injuries or pain while in service. Thus, the examiner would have derived no benefit from review of those records.

Turning to the Veteran's claim that his knee disabilities are secondary to his service-connected back disability, the Board finds this assertion lacks merit. There is no medical evidence linking his back disability to his knee disabilities. Although there are records indicating the Veteran walks with an altered gait, this gait has neither been attributed to his back disability, nor is there evidence it caused or aggravated his knee disabilities. At no point during the Veteran's extensive treatment for back and knee pain has a physician opined his back disability caused or aggravated his current right and left knee disabilities. Thus, there is no competent evidence his knee disabilities were caused or aggravated by his service-connected back disability. 38 C.F.R. 3.310.

The Board recognizes that the task of moving large kitchen equipment up the stairs into a three story building using only a dolly is a grueling task that caused great stress on the Veteran's body. However, there is no evidence this assignment caused the Veteran's current diagnoses. The Veteran was not diagnosed with mild osteoarthritis until at least six years after separating from service, all of his imaging prior to July 2016 was normal, and the degenerative changes in his knees are consistent with expected development over time.

In sum, the Board finds the elements of service connection for right elbow, right knee, and left knee disabilities have not been met. Accordingly, service connection for the claimed disabilities is not warranted. In reaching this conclusion, the Board has considered the applicability of the benefit-of-the-doubt doctrine. However, as the preponderance of the evidence is against these claims, that doctrine is not

applicable. *See* 38 U.S.C.A. § 5107(b); 38 C.F.R. § 3.102; *Gilbert v. Derwinski*, 1 Vet. App. 49, 53.

ORDER

Entitlement to service connection for a right knee disability is denied.

Entitlement to service connection for a left knee disability is denied.

Entitlement to service connection for a right elbow disability is denied.

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MICHELLE L. KANE
Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (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. Your local VA office will implement the Board'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. Please note that if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your appeal at the Court because of jurisdictional conflicts. If you file a Notice of Appeal with the Court ***before*** you file a motion with the Board, the Board will not be able to consider your motion without the Court's permission or until your appeal at the Court is resolved.

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 Board 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 Board to reconsider any part of this decision by writing a letter to the Board clearly explaining why you believe that the Board 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 your letter be as specific as possible. A general statement of dissatisfaction with the Board decision or some other aspect of the VA claims adjudication process will not suffice. If the Board 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:

Litigation Support Branch
Board of Veterans' Appeals
P.O. Box 27063
Washington, DC 20038

CONTINUED ON NEXT PAGE

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 Board to vacate any part of this decision by writing a letter to the Board 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 on the previous page for the Litigation Support Branch, 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 on the previous page for the Litigation Support Branch, 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 Board, 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: If you hire an attorney or agent to represent you, a copy of any fee agreement must be sent to VA. The fee agreement must clearly specify if VA is to pay the attorney or agent directly out of past-due benefits. See 38 C.F.R. 14.636(g)(2). If the fee agreement provides for the direct payment of fees out of past-due benefits, a copy of the direct-pay fee agreement must be filed with the agency of original jurisdiction within 30 days of its execution. A copy of any fee agreement that is not a direct-pay fee agreement must be filed with the Office of the General Counsel within 30 days of its execution by mailing the copy to the following address: Office of the General Counsel (022D), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. See 38 C.F.R. 14.636(g)(3).

The Office of the 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 the General Counsel. See 38 C.F.R. 14.636(i); 14.637(d).