



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

IN THE APPEAL OF
VICKY M. QUINN



DOCKET NO. 13-09 158

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DATE **31 JUL 2017**
MDP

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

THE ISSUES

1. Entitlement to service connection for bilateral shoulder disability.
2. Entitlement to service connection for right groin disability.
3. Entitlement to service connection for asthma.
4. Entitlement to a disability rating in excess of 40 percent for a urinary tract disorder (UTI) and cystitis.

REPRESENTATION

Appellant represented by: Penelope E. Gronbeck, Attorney

WITNESS AT HEARING ON APPEAL

Appellant



ATTORNEY FOR THE BOARD

R. Erdheim, Counsel

INTRODUCTION

The Veteran served on active duty from June 1995 to April 1999, with reserve service afterwards.

This matter comes to the Board of Veterans' Appeals (Board) on appeal from a March 2012 rating decision by a Regional Office (RO) of the Department of Veterans Affairs (VA). The Veteran presented testimony at a Board hearing in August 2014. The Board remanded the claim in April 2015.

FINDINGS OF FACT

1. The Veteran's contended bilateral shoulder disability and right groin disability, and asthma, were not caused or aggravated, or had their onset, during active service.
2. Throughout the appeal period, the Veteran's UTI/cystitis has required wearing absorbent materials that must be changed 2 to 4 times per day.

CONCLUSIONS OF LAW

1. The criteria for service connection for a bilateral shoulder disability have not been met. 38 U.S.C.A. §§ 1110, 1112, 1113, 5107 (West 2014); 38 C.F.R. §§ 3.102, 3.303, 3.304 (2016).
2. The criteria for service connection for a right groin disability have not been met. 38 U.S.C.A. §§ 1110, 1112, 1113, 5107 (West 2014); 38 C.F.R. §§ 3.102, 3.303, 3.304 (2016).

3. The criteria for service connection for asthma have not been met. 38 U.S.C.A. §§ 1110, 1112, 1113, 5107 (West 2014); 38 C.F.R. §§ 3.102, 3.303, 3.304 (2016).

4. The criteria for a rating in excess of 40 percent for a UTI/cystitis have not been met. 38 U.S.C.A. § 1155, 5103, 5103A, 5107 (West 2014); 38 C.F.R. § 3.159, 4.1-4.14, 4.115a, 4.115b, 4.124a, Diagnostic Codes 7512, 7542 (2016).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

With respect to the Veteran's claim herein, VA has met all statutory and regulatory notice and duty to assist provisions. *See* 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5106, 5107, 5126 (West 2014); 38 C.F.R. §§ 3.102, 3.156(a), 3.159, 3.326 (2016); *see also Scott v. McDonald*, 789 F.3d 1375 (Fed. Cir. 2015). The Board notes that an additional VA examination to assess the severity of the Veteran's UTI/cystitis was obtained in June 2017, after the most recent supplemental statement of the case. Subsequently, in June 2017, the RO readjudicated the claim for increased rating in a rating decision, thus, this new evidence was considered in the first instance. Moreover, while the Veteran submitted a statement with regard to her claim for service connection for asthma in July 2017, such statement is considered to be duplicative of her other, prior statements of record and thus has already been considered by the RO.

Service Connection

Service connection may be granted for a disability resulting from disease or injury incurred in or aggravated by service. 38 U.S.C.A. § 1131; 38 C.F.R. § 3.303 (a). Service connection may also be granted for any disease diagnosed after discharge, when all of the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303 (d).



Direct service connection may be granted with medical evidence of a current disability; medical or, in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and medical evidence of a nexus between the claimed in-service disease or injury and the present disease or injury. 38 U.S.C.A. § 1112; 38 C.F.R. § 3.304. *See also Caluza v. Brown*, 7 Vet. App. 498, 506 (1995) *aff'd*, 78 F.3d 604 (Fed. Cir. 1996) [(table)].

Alternatively, service connection may be established under 38 C.F.R. § 3.303 (b) by evidence of (i) the existence of a chronic disease in service or during an applicable presumption period under 38 C.F.R. § 3.307, (ii) present manifestations of the same chronic disease, and (iii) evidence of continuity of symptomatology. *Walker v. Shinseki*, 708 F.3d 1331 (Fed. Cir. 2013). If the claimed disability is not one listed under 38 C.F.R. § 3.309, credible lay evidence of continuous symptoms can support the claim.

The Veteran contends that she injured her shoulders and right groin during service and that she has suffered from pain in these regions since service. She contends that she hurt her shoulders pulling shore cables onboard her ship, and that she injured her right groin while completing these same or similar duties. She contends that her asthma began while aboard the *USS Peterson DD969*, and might be due to asbestos exposure.

The Board finds, however, that service connection for a bilateral shoulder disability, a right groin disability, and asthma, must be denied. For one, the service treatment records are negative for a diagnosis of a shoulder disability, a groin disability, or asthma. Rather, on 1999 separation examination, the Veteran denied experiencing shoulder pain, muscle pain of her right leg/thigh, or asthma.

Next, the evidence does not reflect a continuity of symptoms since service separation, or a medical link between these disabilities and the Veteran's service.

In February 2012, a VA examiner conducted a physical examination of the Veteran and reviewed the claims file, but determined that it was less likely than not that the Veteran's reported current groin pain or asthma were caused or aggravated by her



service. With regard to asthma, the examiner found no indication of asthma in service. The examiner noted that the groin pain currently reported was not shown in the service records. While the service records included one notation of reported groin pain, the symptoms and pathology of that reported incident and the Veteran's current symptoms were different conditions. Finally, with regard to the Veteran's bilateral shoulder pain, the examiner found no indication of a current shoulder disability that could be related to service.

In September 2016, another VA examiner conducted physical examination of the Veteran and reviewed the claims file. The examiner determined that the Veteran did not have a diagnosed shoulder disability or right groin disability. While she reported subjective symptoms of some tingling and pain in these areas, there was no diagnosis to be made based upon the pathology shown. Such was consistent with the VA records, which also showed no diagnosis of a shoulder or groin disability. Notably, the service records showed one complaint of right inguinal pain, but the Veteran's current symptoms were not located in that region. With regard to the Veteran's asthma, the examiner remarked that the Veteran did not have asbestosis or any characteristic lung function abnormalities of asbestosis. Her asthma was diagnosed following separation from service, and the medical literature showed no epidemiologic evidence of a cause and effect relationship between activities of being on board a ship, to include breathing in gasoline fumes, oil fumes, dust, or debris, and the later development of asthma.

In this case, based upon the competent medical evidence as summarized above, the Board finds that service connection is not warranted for a shoulder disability, right groin disability, or asthma. The Board has taken into consideration the Veteran's assertions that she has suffered from groin pain, shoulder pain, and breathing difficulty since service. However, the Veteran is not competent to diagnose asthma, and the record does not reflect a current diagnosis of a shoulder disability or a right groin disability. *Kahana v. Shinseki*, 24 Vet. App. 428, 435 (2011). The competent medical evidence, to include two VA opinions, do not support a finding that the Veteran suffers from a bilateral shoulder disability or right groin disability. While the Veteran reported to her VA treatment provider in 2015 that she was previously diagnosed with a rotator cuff tear, there is no evidence to substantiate that she was



diagnosed with this condition. In that regard, in the absence of proof of a present disability, there can be no valid claim. *Brammer v. Derwinski*, 3 Vet. App. 223, 225 (1992). The Board has considered *McClain v. Nicholson*, 21 Vet. App. 319, 321 (2007), however, the medical evidence does not demonstrate a diagnosis of a shoulder disability and/or right groin disability. Therefore, as the first element of a claim for service connection, that of a disability, has not been shown, service connection for a bilateral shoulder disability or a right groin disability must be denied. And, while the Veteran reports that she was exposed to asbestos while on board her ship in service, the competent medical opinions of record demonstrate that she has not been diagnosed with an asbestos-related disability, and the opinions also found it to be less likely than not that her asthma was caused or aggravated by her service. As the preponderance of the evidence is against the Veteran's claims for service connection, they must be denied.

Increased Rating

Ratings for service-connected disabilities are determined by comparing the veteran's symptoms with criteria listed in VA's Schedule for Rating Disabilities, which is based, as far as practically can be determined, on average impairment in earning capacity. Separate diagnostic codes identify the various disabilities. 38 C.F.R. Part 4. When rating a service-connected disability, the entire history must be borne in mind. *Schafraath v. Derwinski*, 1 Vet. App. 589 (1991). Where there is a question as to which of two ratings shall be applied, the higher rating will be assigned if the disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned. 38 C.F.R. § 4.7. The Board will consider entitlement to staged ratings to compensate for times since filing the claim when the disability may have been more severe than at other times during the course of the claim on appeal. *Fenderson v. West*, 12 Vet. App. 119 (1999); *Hart v. Mansfield*, 21 Vet. App. 505 (2007).

The Veteran's service-connected UTI, previously diagnosed as cystitis, is rated as 40 percent disabling pursuant to DC 7542, which pertains to neurogenic bladder. That condition is to be rated pursuant to a voiding dysfunction. The Veteran was previously rated at 40 percent pursuant to DC 7512, which pertains to cystitis, and



which is also rated pursuant to a voiding dysfunction. 38 C.F.R. § 4.115, Diagnostic Code 7512, 7542. For voiding dysfunctions, a 40 percent evaluation is warranted for requiring the wearing of absorbent materials which must be changed 2 to 4 times per day; or daytime voiding interval less than one hour, or; awakening to void five or more times per night. A 60 percent evaluation is warranted for requiring the use of an appliance or the wearing of absorbent materials which must be changed more than 4 times per day. *Id.*

The Veteran contends that her service-connected UTI/cystitis results in frequent urinary incontinence and bladder pain. However, on VA examinations conducted in February 2012, September 2016, and in June 2017, it was found that the Veteran did not use pads or absorbent materials for her urinary leakage. Moreover, in September 2016, the VA examiner concluded that the Veteran did not suffer from interstitial cystitis, but rather suffered from recurrent urinary tract infections. That conclusion was based upon a review of the relevant VA treatment records showing recurrent UTIs rather than cystitis. That being the case, her symptoms of leakage, increased voiding, and bladder pain were less likely than not caused by her recurrent urinary tract infections. A February 2015 VA record had noted that the Veteran's reported symptoms were suspected to be related to musculoskeletal or gynecological causes, rather than urological. In any event, as the requirements for an increased rating for a voiding dysfunction have not been shown, the Board finds that a higher rating for the Veteran's service-connected disability is not warranted.

(CONTINUED ON NEXT PAGE)



ORDER

Service connection for a bilateral shoulder disability is denied.

Service connection for a right groin disability is denied.

Service connection for asthma disability is denied.

A rating in excess of 40 percent for cystitis/UTI is denied.

M. E. LARKIN
Veterans Law Judge, Board of Veterans' Appeals

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (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**

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).