



BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: June 21, 2018

MARJORIE PERRIN

Dear Appellant:

The Board of Veterans' Appeals (Board) has made a decision in your appeal, and a copy is enclosed.

<i>If your decision contains a</i>	<i>What happens next</i>
Grant	The Department of Veterans Affairs (VA) will be contacting you regarding the next steps, which may include issuing payment. Please refer to VA Form 4597, which is attached to this decision, for additional options.
Remand	Additional development is needed. VA will be contacting you regarding the next steps.
Denial or Dismissal	Please refer to VA Form 4597, which is attached to this decision, for your options.

If you have any questions, please contact your representative, if you have one, or check the status of your appeal at <http://www.vets.gov>.

Sincerely yours,

Kimberly Osborne
Deputy Vice Chairman

Enclosures (1)



BOARD OF VETERANS' APPEALS

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IN THE APPEAL OF
MARJORIE PERRIN
IN THE CASE OF
WALTER PERRIN

██████████
Docket No. 15-07 458

DATE: June 21, 2018

ORDER

Entitlement to service connection for the Veteran's cause of death is denied.

FINDINGS OF FACT

1. The Veteran died in November 1996. The certificate of death lists the Veteran's immediate cause of death as metastatic carcinoma brain, due to or as a consequence of lung carcinoma and seizure disorder, with chronic obstructive lung disease listed as a significant condition contributing to death.
2. At the time of the Veteran's death, he was service-connected for dermatophytosis which was assigned a non-compensable rating.
3. The Veteran was not exposed to asbestos in service.
4. The Veteran's cause of death is not etiologically related to active service.

CONCLUSION OF LAW

The criteria for service connection for the Veteran's cause of death have not been met. 38 U.S.C. §§ 1110, 1131, 1310, 5103, 5103A (2012); 38 C.F.R. §§ 3.102, 3.303, 3.307, 3.309, 3.312 (2017).

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran had active duty service with the United States Army from December 1942 to February 1946. The Appellant is the Veteran's surviving spouse.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a July 2013 rating decision from the Department of Veterans Affairs (VA) Regional Office in Philadelphia, Pennsylvania (RO), which denied entitlement to service connection for the Veteran's cause of death.

Entitlement to service connection for the Veteran's cause of death

Determinations as to whether service connection may be granted for a disability that caused or contributed to a veteran's death are based on the same statutory and regulatory provisions that generally govern determinations of service connection. *See* 38 U.S.C. § 1110 (2012); 38 C.F.R. §§ 3.303, 3.307, 3.309 (2017). Service connection may be granted for disease or injury incurred in or aggravated by active service. 38 C.F.R. § 3.303(d) (2016). As a general matter, service connection for a disability requires evidence of: (1) the existence of a current disability; (2) the existence of the disease or injury in service, and; (3) a relationship or nexus between the current disability and any injury or disease during service. *Shedden v. Principi*, 381 F.3d 1163 (Fed. Cir. 2004); *see also Hickson v. West*, 12 Vet. App. 247, 253 (1999), citing *Caluza v. Brown*, 7 Vet. App. 498, 506 (1995), *aff'd*, 78 F.3d 604 (Fed. Cir. 1996).

The death of a veteran will be considered to have been due to a service-connected disability where the evidence establishes that a disability was either the principal or the contributory cause of death. 38 C.F.R. § 3.312 (a) (2017). A principal cause of death is one which, singly or jointly with some other condition, was the immediate or underlying cause of death or was etiologically related thereto. 38 C.F.R. § 3.312(b) (2017). A contributory cause of death is one which contributed substantially or materially to cause death, or aided or lent assistance to the production of death. *See* 38 C.F.R. § 3.312(c) (2017).

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In rendering a decision on appeal the Board must analyze the credibility and probative value of all medical and lay evidence, account for the evidence which it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. 38 U.S.C. § 1154(a) (2012); *Gabrielson v. Brown*, 7 Vet. App. 36, 39-40 (1994); *Gilbert v. Derwinski*, 1 Vet. App. 49, 57 (1990).

The standard of proof to be applied in decisions on claims for veterans' benefits is set forth in 38 U.S.C. § 5107. A claimant is entitled to the benefit of the doubt when there is an approximate balance of evidence for and against the claim. See 38 C.F.R. § 3.102 (2016). When a claimant seeks benefits and the evidence is in relative equipoise, the claimant prevails. See *Gilbert*, 1 Vet. App. 49. The preponderance of the evidence must be against the claim for benefits to be denied. See *Aleman v. Brown*, 9 Vet. App. 518 (1996).

The Veteran's certificate of death shows that he died in November 1996. His certificate of death lists the immediate cause of death was metastatic carcinoma brain, due to or as a consequence of lung carcinoma and seizure disorder, with chronic obstructive lung disease listed as a significant condition contributing to death. The record does not otherwise contain medical opinion evidence which addresses the cause of the Veteran's death.

The Appellant, within a February 2013 statement, contends that the Veteran's lung carcinoma, a condition that contributed to the Veteran's death, was caused by exposure to asbestos during his active service with the Army during World War II. She reported that during the Veteran's lifetime, he spoke many times about the many repairs he made to trucks in service. The Appellant included an article titled Asbestos in the Automotive Industry, which states that "the automotive industry has been regarded as one of the more hazardous working environments due to the high volume of confirmed asbestos exposures, particularly among mechanics."

The Veteran's DD Form 214 shows a military occupation specialty of heavy truck driver.

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Although there is no specific statutory or regulatory guidance regarding claims for residuals of asbestos exposure, VA has several guidelines for compensation claims based on asbestos exposure. *See* M21-1MR, IV.ii.2.C.9; and M21-1MR, IV.ii.1.H.29. VA Adjudication Manual, M21-1, Section IV.ii.2.C.2.d provides that some of the major occupations involving exposure to asbestos includes the servicing of friction products such as brake linings. In addition, an opinion by the VA General Counsel discussed the provisions of M21-1 regarding asbestos claims and, in part, concluded that medical nexus evidence was needed to establish a claim based on in-service asbestos exposure. VAOPGCPREC 4-00; 65 Fed. Reg. 33422 (2000).

Here, VA determined that the Veteran did not have in-service asbestos exposure, as his established MOS is not recognized as having any exposure to asbestos, per VA guidelines. Based on this information, VA declined to concede asbestos exposure. The only other evidence of record tending to relate the Veteran's cause of death and asbestos exposure in service is the Appellant's own statements, however, the Board finds that the Appellant is not competent to opine as to the Veteran's exposure to asbestos because she not only lacks the requisite training and expertise to make such a determination but she also did not have personal knowledge of the event. *Jandreau v. Nicholson*, 492 F.3d 1372, 1376-77 (Fed. Cir. 2007). Therefore, the Board must find that the Veteran was not exposed to asbestos in service and further discussion of a contention of such is not warranted. Rather, the Board will determine whether the Veteran's cause of death was not otherwise due to his military service.

The Appellant also contends that the Veteran's lung cancer is related to his significant inservice dental problems. She asserts that there is existing medical research that shows associations between dental decay, periodontitis and lung cancer. This medical research was not, however, identified.

Although inservice dental problems are acknowledged; there is no competent evidence attributing the Veteran's lung cancer to service to include any dental

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problems therein. The Appellant's lay contention, alone, is not competent and does not serve to establish a viable link between the Veteran's lung cancer and his inservice dental problems. Again, specific medical literature was not provided that supports a link between lung cancer and dental problems.

Service treatment records do not show complaints, treatment or a diagnosis of metastatic carcinoma brain, lung carcinoma, seizure disorder, or chronic obstructive lung disease.

VA attempted to obtain identified private treatment records, however, provider letters within the record indicated that the Veteran's records could not be located as they had been destroyed after 10 years.

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Therefore, because the evidence of record does not contain a medical opinion or offer competent, credible and probative evidence identifying a relationship between the Veteran's death and service, the Board finds that service connection for the cause of the Veteran's death is not warranted. 38 C.F.R. § 3.102 (2017). As the preponderance of evidence is against the claim, the benefit of the doubt doctrine is not for application. 38 C.F.R. § 3.102 (2017); *Aleman*, 9 Vet. App. 518. |



K. PARAKKAL
Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD

M. R. Woodarek, Associate Counsel

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.cave.gov>, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

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

How do I file a motion for reconsideration? You can file a motion asking the 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).