



BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

IN THE APPEAL OF
STEVEN GREENE
REPRESENTED BY
Illinois Department of Veterans Affairs


Docket No. 16-11 604

DATE: September 19, 2018

ORDER

Entitlement to an effective date earlier than May 27, 2013 for the grant of service connection for coronary artery disease is denied.

Entitlement to an effective date earlier than August 08, 2011 for the grant of service connection for diabetes mellitus, Type II is denied.

FINDINGS OF FACTS

1. The Veteran's claim of service connection for coronary artery disease was not received earlier than May 27, 2013.
2. The Veteran's claim of service connection for diabetes mellitus was not received earlier than August 08, 2011.

CONCLUSIONS OF LAW

1. The criteria for an effective date earlier than May 27, 2013 for coronary artery disease have not been met. 38 U.S.C. § 5110; 38 C.F.R. § 3.400.
2. The criteria for an effective date earlier than August 08, 2011 for diabetes mellitus, type II, have not been met. 38 U.S.C. § 5110; 38 C.F.R. § 3.400.

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REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty from August 1969 to August 1971.

Effective Date

The Veteran is seeking an effective date earlier than assigned for his service-connected coronary artery disease and diabetes mellitus.

Section 5110(a), Title 38, United States Code, provides that “[u]nless specifically provided otherwise in this chapter, the effective date of an award based on an original claim . . . of compensation . . . shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.” The implementing regulation, 38 C.F.R. § 3.400, similarly states that the effective date of service connection “will be the date of receipt of the claim or the date entitlement arose, whichever is the later.”

The VA administrative claims process recognizes formal and informal claims. A formal claim is one that has been filed in the form prescribed by VA. 38 U.S.C. § 5101(a); 38 C.F.R. § 3.151 (a). An informal claim may be any communication or action indicating intent to apply for one or more benefits under VA law. *Thomas v. Principi*, 16 Vet. App. 197 (2002); 38 C.F.R. §§ 3.1 (p), 3.155(a). An informal claim must be written and it must identify the benefit being sought.

Although a claimant need not identify the benefit sought “with specificity,” some intent on the part of the veteran to seek benefits must be demonstrated. VA has a duty to fully and sympathetically develop a veteran’s claim to its optimum. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998). This duty requires VA to “determine all potential claims raised by the evidence, applying all relevant laws and regulations,” and extends to giving a sympathetic reading to all pro se pleadings of record.

Here, although the Veteran asserts that service connection for coronary artery disease should be effective earlier than May 27, 2013, he does not contend that he filed a claim earlier than this date. Similarly, he does not claim that he filed a claim for service connection for diabetes earlier than August 08, 2011. Rather, the

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Veteran is seeking an earlier effective date based on the fact that he was diagnosed with these conditions prior to the effective dates assigned. *See* hearing transcript 4-5.

After thorough review of the record, the Board finds that there is no evidence of record that shows claim for either service-connection for coronary artery disease or diabetes before the effective dates assigned. Notably, in May 2006, the Veteran filed a service connection claim for kidney condition and did not make a general claim for service connection. The claim did not raise the issue of service connection for either coronary artery disease or diabetes mellitus, type II. The service connection claims for diabetes and coronary artery disease were granted based on herbicide presumption and not in-service diagnosis. For these reasons, this case is distinguishable from *Sellers v. Wilkie*, CAVC No. 16-2993 (August 2018).

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The fact that the Veteran was treated for coronary artery disease before the effective dates assigned is not grounds to assign earlier effective date. As noted above, an effective date is assigned based on either when a claim was filed or when entitlement arose, whichever is later. Therefore, absent evidence that the Veteran sought service connection for coronary artery disease before May 27, 2013 or for diabetes before August 8, 2011, the Board finds that the preponderance of the evidence in the record is against the Veteran's claims.



Nathaniel J. Doan
Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD

S.SOLOMON



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).