BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: December 19, 2018 C [redacted]

EDJUEL R. BURKHALTER

Dear Appellant:

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

If your decision contains a	*What happens next*
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,

K. Osborne
Deputy Vice Chairman
Enclosures (1)
CC: Christopher Attig, Attorney

BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

IN THE APPEAL OF
EDJUEL R. BURKHALTER
REPRESENTED BY
Christopher Attig, Attorney

C [redacted]
Docket No. 15-35 165
Advanced on the Docket

DATE: December 19, 2018

ISSUES

1. Entitlement to service connection for a jaw disability, to include jaw dislocation.

2. Entitlement to service connection for a neck disability, to include as secondary to a back disability.

3. Entitlement to an initial rating in excess of 20 percent for the period prior to October 14, 2016, and in excess of 40 percent from October 14, 2016, forward, for service-connected compression fractures of the thoracolumbar spine with degenerative disc disease (DDD) and strain, to include on an extraschedular basis.

4. Entitlement to an effective date earlier than August 7, 2012, for service-connected compression fractures of the thoracolumbar spine with DDD and strain, claimed as a back disability.

5. Entitlement to a total disability rating based on individual unemployability due to a service-connected disability (TDIU).

ORDER

Entitlement to an effective date earlier than August 7, 2012, for service-connected compression fractures of the thoracolumbar spine with DDD and strain is denied.

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REMANDED

Entitlement to service connection for a jaw disability, to include jaw dislocation, is remanded.

Entitlement to service connection for a neck disability, to include as secondary to a back disability.

Entitlement to an initial rating in excess of 20 percent for the period prior to October 14, 2016, and in excess of 40 percent from October 14, 2016, forward, for service-connected compression fractures of the thoracolumbar spine with DDD and strain, to include on an extraschedular basis, is remanded.

Entitlement to a TDIU is remanded.

FINDINGS OF FACT

1. In an unappealed January 1958 rating decision, the RO denied entitlement to service connection for a back disability.

2. In 1974 the Veteran filed a claim to reopen his previously denied claim for entitlement to service connection for a back disability, and in an August 1974 rating decision the AOJ denied the Veteran's claim to reopen. The August 1974 rating decision was unappealed and became final.

3. In June 1980 the Veteran filed a claim to reopen his previously denied claim for entitlement to service connection for a back disability, and in a July 1980 notification the AOJ denied the Veteran's claim to reopen. The July 1980 decision was unappealed and became final.

4. The Veteran filed a claim reopen his previously denied claims of entitlement to service connection for a back disability on August 7, 2012, and in a February 2014 rating decision, the AOJ reopened the Veteran's previously denied claim. In a July 2016 decision, the Board reopened the Veteran's claim, and the AOJ thereafter

granted service connection for compression fractures of the thoracolumbar spine with DDD and strain, effective August 7, 2012.

CONCLUSION OF LAW

The criteria for an effective date earlier than August 7, 2012 for the award of service connection for service-connected compression fractures of the thoracolumbar spine with DDD and strain, claimed as a back disability. 38 U.S.C. §§ 5101, 5110 (2012); 38 C.F.R. §§ 3.102, 3.400 (2017).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty from April 1953 to April 1957.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from a February 2014 rating decision from the Department of Veterans Affairs (VA) Regional Office (RO) in Waco, Texas.

Concerning the issues of entitlement to service connection for a neck disability and for a jaw disability, on the Veteran's September 2015 VA Form 9, the Veteran requested a hearing by live videoconference at a local VA office. The Veteran was accordingly scheduled for a videoconference to be held on June 8, 2016. However, in a June 7, 2016 correspondence, the Veteran cancelled his hearing and withdrew his request for a videoconference hearing. Instead, the Veteran directed the Board to immediately issue its opinion based on the evidence of record. No further response was received by the Board, and the Board considers the Veteran's request for a hearing withdrawn. Therefore, this case is ready for appellate review.

Concerning the issues of entitlement to an increased rating and entitlement to an earlier effective date for service-connected compression fractures of the thoracolumbar spine with DDD and strain, the Veteran filed a VA Form 9 in December 2017. In the VA Form 9, the Veteran requested a videoconference hearing. However, in an August 2018 correspondence, the Veteran provided a 90

day brief in lieu of oral argument. Given the August 2018 correspondence, the Board considers the Veteran's request for a hearing withdrawn and such issues are ready for appellate review.

The issues of entitlement to service connection for a jaw disability and a neck disability were previously remanded by the Board in July 2016. However, as explained further below, the issues are remanded for further development.

In *Rice v. Shinseki*, 22 Vet. App. 447 (2009), the United States Court of Appeals for Veterans Claims (Court) held that a claim for a TDIU is part and parcel of an increased rating claim when such claim is raised by the record. In a June 2016 and August 2018 brief in lieu of oral argument, the Veteran asserts that he lost his job as a result of his constant back pain. In light of the Court's holding in *Rice*, the Board has considered the TDIU claim as part of his pending increased rating claim and has accordingly listed the raised TDIU claim as an issue.

As noted in the Board's prior remand, the issues of entitlement to service connection for hearing loss and tinnitus have been raised by the record in an April 2013 Report of General, Information. Such issues have still not been adjudicated by the Agency of Original Jurisdiction (AOJ). Therefore, the Board does not have jurisdiction over such issues and refers these issues to the AOJ for appropriate action. 38 C.F.R. § 19.9(b) (2017).

The Veterans Claims Assistance Act of 2000 (VCAA) and implementing regulations impose obligations on VA to provide claimants with notice and assistance. 38 U.S.C. §§ 5102, 5103, 5103A, 5107 (2012); 38 C.F.R. §§3.102, 3.156(a), 3.159, 3.326(a) (2017).

The Veteran in this case has not referred to any deficiencies in either the duties to notify or assist; therefore, the Board may proceed to the merits of the claim. See *Scott v. McDonald*, 789 F.3d 1375, 1381 (Fed.Cir. 2015, cert denied, U.S.C. Oct.3, 2016) (holding that "the Board's obligation to read filings in a liberal manner does not require the Board....to search the record and address procedural arguments when the [appellant] fails to raise them before the Board*"); Dickens v. McDonald*, 814 F.3d 1359, 1361 (Fed. Cir. 2016) (applying *Scott* to an appellant's failure to raise a duty to assist argument before the Board).

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Earlier Effective Date

Generally, the effective date for an award based on, inter alia, an original claim or a claim reopened after a final adjudication shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefore. 38 U.S.C. § 5110 (a). Except as otherwise provided, the effective date of an evaluation and award of pension, compensation or dependency and indemnity compensation based on an original claim, a claim reopened after final disallowance, or a claim for increase will be the date of the receipt of the claim or the date entitlement arose, whichever is the later. 38 C.F.R. § 3.400.

If, however, a claim for service connection is received within a year following separation from service, the effective date will be the day following separation; otherwise, the effective date is the date of the claim, or date entitlement arose, whichever is later. 38 U.S.C. § 5110 (b)(1); 38 C.F.R. § 3.400 (b)(2)(i).

When an award is based on a claim to reopen a previously denied claim, the effective date will be the date of receipt of the new (i.e., reopened) claim or the date entitlement arose, whichever is later, unless new and material evidence was received within the relevant appeal period. 38 C.F.R. § 3.400 (q). If new and material evidence other than service department records is received within the appeal period or prior to appellate decision, the effective date will be as though the former decision had not been rendered.

VA must look to all communications from a Veteran which may be interpreted as applications or claims - formal and informal - for benefits. VA has a duty to fully and sympathetically develop the Veteran's claim to its optimum, which includes determining all potential claims raised by the evidence and applying all relevant laws and regulations. *Harris v. Shinseki*, 704 F.3d 946, 948-49 (Fed. Cir. 2013); *Szemraj v. Principi*, 357 F.3d 1370, 1373 (Fed. Cir. 2004); *Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001).

Entitlement to an effective date earlier than August 7, 2012, for service-connected compression fractures of the thoracolumbar spine with DDD and strain, claimed as a back disability, is denied.

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The Veteran appeals the effective date of the grant of his service-connected compression fractures of the thoracolumbar spine with DDD and strain. The Veteran asserts that the evidence supports three earlier effective dates: a) the date of separation from service; b) the date of his March 1974 claim to reopen; and/or c) the date of his June 1980 claim to reopen. *See* August 2018 90 day brief in lieu of oral argument.

Regarding the date of claim, the Veteran was originally denied service connection in a January 1958 rating decision. The Veteran did not file a notice of disagreement (NOD), and the Veteran did not file any additional evidence within a year of the rating decision. Therefore, the January 1958 denial became final.

In 1974, the Veteran then filed a claim to reopen the issue, and in an August 1974 rating decision, the RO denied the Veteran's claim to reopen. Again, the Veteran did not file a NOD, and the Veteran did not file any additional evidence within a year of the rating decision. Therefore, the August 1974 denial became final.

Additional medical records were filed in June 1980 in an attempt to reopen the claim. However, in a July 1980 notification, the AOJ denied the Veteran's claim. The Veteran was informed of his appellate rights with his denial, but did not file a timely appeal, nor submit new and material evidence within one year of the denial. Furthermore, the Veteran did not assert there was clear and unmistakable error. Therefore, the decision became final. 38 U.S.C. § 7105 (c) (West 2014); 38 C.F.R. §§ 3.104, 20.302, 20.1103 (2017).

In August 2012, the Veteran sought to reopen his claim for entitlement to service connection for a back disability, and in a February 2014 rating decision, the AOJ reopened the Veteran's previously denied claim. In a July 2016 decision, the Board reopened the Veteran's claim, and the AOJ thereafter granted service connection for compression fractures of the thoracolumbar spine with DDD and strain, effective August 7, 2012.

The Board finds that the date of claim was August 7, 2012, as there were no earlier statements of record that could be construed as a claim to reopen. Again, when an award is based on a claim to reopen a previously denied claim, the effective date will be the date of receipt of the new (i.e., reopened) claim or the date entitlement

arose, whichever is later, unless new and material evidence was received within the relevant appeal period. 38 C.F.R. § 3.400 (q).

The Board acknowledges the Veteran's argument that entitlement should be from the date of separation from service. The Board notes that the records contain complaints of a back disability as early as the Veteran's discharge from service in 1957 and that the Veteran previously filed a claim upon discharge. However, such claim was denied in 1958 and became final, as explained above. Again, when an award is based on a claim to reopen a previously denied claim, as in this case, the effective date will be the date of receipt of the new (i.e., reopened) claim or the date entitlement arose, whichever is later. 38 C.F.R. § 3.400 (q). Therefore, in this case, the proper effective date is the last date of the Veteran's claim to reopen, August 7, 2012, as it is the *later* of the two dates. *See* 38 U.S.C. § 5110 (a); 38 C.F.R. § 3.400.

Similarly, the Board acknowledges the Veteran's argument that entitlement should be from the date of his March 1974 claim to reopen and/or the date of his June 1980 claim to reopen. However, both claims to reopen were denied by the RO and became final, as explained above. Notably in this case, when an award is based on a claim to reopen a previously denied claim, the effective date will be the date of receipt of the new (i.e., reopened) claim or the date entitlement arose, whichever is later. 38 C.F.R. § 3.400 (q). Therefore, the last claim to reopen was in August 7, 2012, and that is the proper effective date in this case. Therefore, in this case, the proper effective date is the last date of the Veteran's claim to reopen, August 7, 2012. *See* 38 U.S.C. § 5110 (a); 38 C.F.R. § 3.400.

"The statutory framework simply does not allow for the Board to reach back to the date of the original claim as a possible effective date for an award of service-connected benefits that is predicated upon a reopened claim." *Sears v. Principi*, 16 Vet. App. 244, 248 (2002). In order for the Veteran to be awarded an effective date based on an earlier claim, he has to show CUE in the prior denial of the claim, as a collateral attack. *Flash v. Brown*, 8 Vet. App. 332, 340 (1995). Here, however, the Veteran has not alleged CUE in the prior decision that initially considered and denied his claim of entitlement to service connection.

Even when a Veteran has a claim to reopen, "he cannot obtain an effective date earlier than the reopened claim's application date." *Leonard v. Nicholson*, 405 F.3d 1333, 1336-37 (Fed. Cir., 2005) (indicating that "no matter how [the Veteran] tries to define 'effective date,' the simple fact is that, absent a showing of CUE, he cannot receive disability payments for a time frame earlier than the application date of his claim to reopen, even with new evidence supporting an earlier disability date").

Thus, because the Veteran did not timely appeal the prior rating decisions which became final, the earliest possible effective date he can receive for the eventual grant of service connection for a back disability, absent a CUE claim, is the date of his last claim to reopen, August 7, 2012. *See Ingram v. Nicholson*, 21 Vet. App. 232, 249, 255 (2007); *McGrath v. Gober*, 14 Vet. App. 28, 35 (2000) (indicating a claim that has not been finally adjudicated remains pending for purposes of determining the effective date for that disability, but conversely, that a claim which has become final and binding in the absence of an appeal does not remain pending and subject to an earlier effective date).

For these reasons and bases, the Board finds that the preponderance of the evidence is against this claim for an effective date earlier than August 7, 2012, for the grant of service connection for compression fractures of the thoracolumbar spine with DDD and strain. As the preponderance of the evidence is against the claim, the doctrine of reasonable doubt is not for application. *See* 38 U.S.C. § 5107 (b); 38 C.F.R. §§ 3.102, 4.3. Hence, the appeal is denied as to this claim.

REASONS FOR REMAND

1. Entitlement to service connection for a jaw disability is remanded.

The Veteran asserts that he has a current jaw disability as a result of his service. The Veteran had a dislocated jaw in service and was treated with experimental injections.

The Veteran was afforded a VA examination of his temporomandibular joint in November 2013, and was diagnosed with mandibular hypermobility with 62mm II opening greater than 5 ROM. The Veteran was afforded an additional VA examination in October 2016. The VA examiner found that the mandibular hypermobility with 62mm II opening is not a disabling condition, with excellent jaw function without negative sequale.

However, the Board acknowledges that the Veteran previously noted jaw pain in 1974 upon his initial claim for service connection. However, the VA examinations of record do not indicate pain. Upon remand, the VA examiner should report as to the Veteran's symptomatology, to include any asserted pain, and reconcile any past complaints of pain with any current findings.

Additionally, the Board notes that in the Veteran's August 2018 brief in lieu of a hearing, the Veteran, through his representative, "requests a copy of an opinion of any person the VA is putting forth as an expert, his/her resumes, CVs, lists of publications, lists of specialties, copies of all prior opinion rendered at the request of their government employers, etc., such that his/her experience and qualifications may be examined, reviewed, questioned, and/or challenged." The Veteran further objects to the VA examiner's opinion due to lack of support in opinion with scientific, technical, or other specialized knowledge, lack of facts, tests, or data on which to base the opinion, lack of evidence, failure to reliably apply the medical, scientific principles.

2. Entitlement to service connection for a neck disability is remanded.

As discussed above, in the Veteran's August 2018 brief in lieu of a hearing, the Veteran, through his representative, "requests a copy of an opinion of any person the VA is putting forth as an expert, his/her resumes, CVs, lists of publications, lists of specialties, copies of all prior opinion rendered at the request of their government employers, etc., such that his/her experience and qualifications may be examined, reviewed, questioned, and/or challenged." The Veteran further objects

to the VA examiner's opinion due to lack of support in opinion with scientific, technical, or other specialized knowledge, lack of facts, tests, or data on which to base the opinion, lack of evidence, failure to reliably apply the medical, scientific principles.

In this case, the Veteran asserts that he was in the hospital for a neck and back injury in service, that he has since had neck surgery and that he continues to be in pain. The Veteran contends that he injured his back and neck when he stood up while painting and twisted his back.

The Veteran was afforded a VA examination of his neck in November 2013, and the Veteran was diagnosed with cervical spondylosis with DDD/ DJD. The examiner opined that his cervical spine condition is more likely than not the result of aging. There were no complaints regarding the cervical spine found in a review of his service treatment records. However, service treatment records do indicate ain in the lower cervical region but indicate that the Veteran's condition improved with no pain or tenderness. *See* November 1956 service treatment records.

Additionally, a VA addendum opinion was furnished, which opines that the Veteran's cervical spine condition was less likely than not caused by or aggravated by the degenerative disc disease of the lumbar spine with chronic lumbosacral strain and history of compression fractures. The VA examiner noted that "while trauma to the joint or region of the spine may predispose to development of degenerative arthritic changes at that site, there is no evidence that the injury in service affected the cervical spine. However, again the Board notes the November 1956 service treatment record noting lower cervical spine pain. Therefore, the Board remands this matter for an additional VA examination and opinion as to the etiology of the Veteran's cervical spine disability.

3. Entitlement to an initial rating in excess of 20 percent for the period prior to October 14, 2016, and in excess of 40 percent from October 14, 2016, forward, for service-connected compression fractures of the thoracolumbar spine with DDD and strain, to include on an extraschedular basis, is remanded; and entitlement to a TDIU is remanded.

In the Veteran's August 2018 brief in lieu of a hearing, the Veteran, through his representative, "requests a copy of an opinion of any person the VA is putting forth as an expert, his/her resumes, CVs, lists of publications, lists of specialties, copies of all prior opinion rendered at the request of their government employers, etc., such that his/her experience and qualifications may be examined, reviewed, questioned, and/or challenged."

The Veteran further asserts that his spine disability" impacts his ability to work and identifies factors, symptoms and limitations not considered by the rating schedule." *See* August 2018 brief in lieu of a hearing. The Veteran states that his symptoms are not adequately considered by the rating schedule, that the VA has failed to consider entitlement to an extraschedular rating, and that VA has failed to consider his entitlement to a TDIU.

Upon remand, therefore, the Board requests an additional VA examination by a qualified physician, with the Veteran's requested documentation of expertise complied with, and with a consideration of the Veteran's symptoms on a schedular and extraschedular basis, and with a consideration of TDIU. *Smith v. Gober*, 236 F.3d 1370 (Fed. Cir. 2001) (claims for a TDIU are inextricably intertwined with the increased rating claim, and should not be decided until that issue has been resolved).

In addition, the Board notes that the October 2016 VA examination indicates flare-ups. The examination does not comply with the requirements in *Sharp v. Shulkin*, 29 Vet. App. 26, 34-36 (2017). The examiner did not attempt to elicit relevant information regarding the description of the Veteran's flare-ups and any additional functional loss suffered during flare-ups. Therefore, upon remand, the Board directs a new VA examination, with the VA examination report addressing the Veteran's flare-ups in compliance with *Sharp*.

The matter is REMANDED for the following action:

> 1. Obtain all outstanding VA and/or private treatment records. For any private treatment records, obtain the appropriate signed releases from the Veteran, and associate any additional records with the claim. Should

such records exist, associate them with the electronic claims file.

2. Provide the Veteran with appropriate notice of VA's duties to notify and assist regarding the Veteran's claim for entitlement to TDIU, to include notification of how to substantiate a claim for TDIU.

Additionally, provide him with VA Form 21-8940 in connection with the claim for entitlement to TDIU, and request that he supply the requisite information.

3. After the above has been completed, the RO should schedule an appropriate VA examination with an **appropriate physician** to determine the current severity of the Veteran's service-connected compression fractures of the thoracolumbar spine with DDD and strain. The claims folder and this remand must be made available to the examiner for review, and the examination report must reflect that such a review was undertaken.

The examiner is to examine the Veteran's service-connected spine disability and provide a detailed report as to the severity and symptomatology of the Veteran's service-connected disability.

The examiner is to specifically test the range of motion in active motion, passive motion, weight-bearing, and nonweight-bearing, for the joint(s) in question and any paired joint(s). *See Correia v. McDonald*, No. 13-3238, 2016 WL 3591858 (Vet. App. July 5, 2016).

The examiner should detail range of motion measurements, to include the degree at which he experiences pain, any additional impact caused by

motion such as weakness and fatigability, incoordination, or swelling.

If the examiner is unable to conduct the required testing or concludes that the required testing is not necessary in this case, he or she should clearly explain why that is so.

The examiner is to note a full and complete history of the Veteran's symptoms, to include symptoms associated with any **flare-ups**. *see* October 2016 VA examination noting flare-ups. Provide an opinion as to additional functional loss during flare-ups of the musculoskeletal disability, pursuant to *DeLuca v. Brown*, 8 Vet. App. 202 (1995). Should the examiner state that he or she is unable to offer such an opinion without resorting to speculation based on the fact that the examination was not performed during a flare, **the examiner is directed to ascertain information as to the frequency, duration, characteristics, severity, or functional loss**. *Sharp v. Shulkin*, No. 16-1385 (Vet. App. September 6, 2017).

To the extent possible, the examiner should identify any symptoms and functional impairments due to the back disability, alone and discuss the effect of the Veteran's service-connected back disability on any occupational functioning and activities of daily living.

4. After completing directive (1), the RO should schedule an appropriate VA examination with an **appropriate physician** to determine the etiology of the Veteran's jaw disability. The claims folder and this remand must be made available to the examiner for review, and the examination report must reflect that such a review was undertaken.

Any indicated tests and studies must be accomplished and all clinical findings must be reported in detail and correlated to a specific diagnosis**. The examiner must elicit from the Veteran a full and complete history of his jaw disability, including symptoms and/or asserted jaw pain. Any discrepancies in reporting of jaw pain must be reconciled. *See* 1974 complaints of jaw pain; *see also* October 2016 and November 2013 VA examinations reporting no jaw pain.**

The examiner must provide an opinion regarding the following:

(a) **The examiner must comment on whether any complaints of jaw pain alone have resulted in functional impairment of earning capacity.**

(b) Is at least as likely as not (50 percent or greater probability) that the Veteran's **jaw disability or jaw symptoms that result in functional impairment of earning capacity**, had its onset in or is otherwise related to the active military service? **The examiner is directed to the Veteran's service treatment records which note an injury to the Veteran's jaw in service, to include dislocation, with treatment with the use of injections.**

The examiner is asked to explain the reasons behind any opinions expressed and conclusions reached. The examiner is reminded that the term "as likely as not" does not mean "within the realm of medical possibility," but rather that the evidence of record is so evenly divided that, in the examiner's expert opinion, it is as medically sound to find in favor of the proposition as it is to find against it.

Any opinion provided must be sufficiently supported by medical knowledge and rationale, and therefore, not conclusionary in nature. *See Jones v. Shinseki*, 23 Vet. App. 382, 390 (2010). If the examiner is unable to offer the requested opinion, it is essential that the examiner offer a rationale for the conclusion that an opinion cannot be provided without resort to speculation, together with a statement as to whether there is additional evidence that might enable an opinion to be provided, or whether the inability to provide the opinion is based on the limits of medical knowledge. *See Jones v. Shinseki*, 23 Vet. App. 328 (2010).

5. After completing directive (1), the RO should schedule an appropriate VA examination with an **appropriate physician** to determine the etiology of the Veteran's neck disability. The claims folder and this remand must be made available to the examiner for review, and the examination report must reflect that such a review was undertaken. Any indicated tests and studies must be accomplished and all clinical findings must be reported in detail and correlated to a specific diagnosis**.**

The examiner must elicit from the Veteran a full and complete history of his cervical spine disability, including symptoms and/or asserted cervical spine pain.

The examiner must provide an opinion regarding the following:

(a) Is at least as likely as not (50 percent or greater probability) that the Veteran's cervical spine disability, had its onset in or is otherwise related to

the Veteran's active military service, to include the Veteran's neck and back injury while painting tires in service? **The examiner is directed to the Veteran's November 1956 service treatment records which note an injury to the Veteran's neck and back in service. 1956 treatment records indicate complaints of lower cervical pain with improvements.**

(b) Is at least as likely as not (50 percent or greater probability) that the Veteran's cervical spine disability was caused or aggravated by the Veteran's service-connected spine disability? **Again, the examiner is directed to the Veteran's November 1956 service treatment records which note an injury to the Veteran's neck and back in service. 1956 treatment records indicate complaints of lower cervical pain with improvements.**

The examiner is asked to explain the reasons behind any opinions expressed and conclusions reached. The examiner is reminded that the term "as likely as not" does not mean "within the realm of medical possibility," but rather that the evidence of record is so evenly divided that, in the examiner's expert opinion, it is as medically sound to find in favor of the proposition as it is to find against it.

Any opinion provided must be sufficiently supported by medical knowledge and rationale, and therefore, not conclusionary in nature. *See Jones v. Shinseki*, 23 Vet. App. 382, 390 (2010). If the examiner is unable to offer the requested opinion, it is essential that the examiner offer a

rationale for the conclusion that an opinion cannot be provided without resort to speculation, together with a statement as to whether there is additional evidence that might enable an opinion to be provided, or whether the inability to provide the opinion is based on the limits of medical knowledge. *See Jones v. Shinseki*, 23 Vet. App. 328 (2010).

6. For each opinion provided above, **furnish the Veteran and his representative a copy of the examination reports**. Additionally, for each examiner who provides an opinion requested above, **obtain all information stored in VetPort (or any other system of records) that pertains to the examiner's credentials as a medical profressional and furnish the Veteran his represenative a copy**. Such information should include but is not limited to: his/her resumes, CVs, lists of publications, lists of specialties, copies of all prior opinion rendered at the request of their government employers, etc.

Should such requested information regarding the examiners be unavailable, provide evidence and an explanation of such unavailablity to the Veteran and his representative, with a copy of such notification in the electronic claims file.

7. After completing directive (3), if deemed necessary, refer the Veteran's file to the Director of Compensation Service for consideration of entitlement to an extraschedular disability rating for his service-connected back disability. **If referral is not deemed necessary, provide an explanation of such.**

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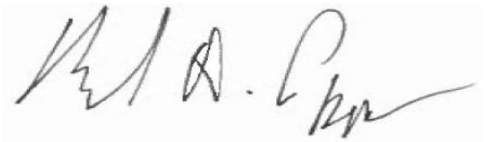
8. After adjudicating the claims on appeal, if the Veteran does not meet the schedular criteria for TDIU under 38 C.F.R. § 4.16 (a) (2017), and if deemed warranted, refer the claim to the Director of Compensation for consideration of an extraschedular TDIU rating. **If referral is not deemed necessary, provide an explanation of such.**

9. If any of the requested benefits remain denied, the Veteran and his representative should be provided with a Supplemental Statement of the Case and an opportunity to respond.



Michael Pappas
Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD J. Tunis, Associate Counsel

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

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/, mailto: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).