



BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: May 1, 2019

TOVANY N. FERNANDEZ
1082 Crazy Horse NW
Palm Bay, FL 32907

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,

K. Osborne
Deputy Vice Chairman

Enclosures (1)
CC: MATTHEW D. HILL



BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

IN THE APPEAL OF
TOVANY N. FERNANDEZ
REPRESENTED BY
MATTHEW D. HILL

████████████████████
Docket No. 16-33 612

DATE: May 1, 2019

ORDER

A 50 percent rating for post-traumatic stress disorder (PTSD) effective from November 15, 2012, but no earlier, is granted, subject to the laws and regulations governing the award of monetary benefits.

A rating in excess of 50 percent for PTSD is denied.

FINDINGS OF FACT

1. The Veteran separated from active service on November 15, 2012.
2. Since separation, the Veteran's PTSD has been shown to cause occupational and social impairment with reduced reliability and productivity, but not worse.

CONCLUSIONS OF LAW

1. The criteria for a 50 percent rating for PTSD effective November 15, 2012, but no earlier, are met. 38 U.S.C. §§1155, 5110; 38 C.F.R. §§3.400, 4.130, Diagnostic Code (DC) 9411.
2. The criteria for a rating in excess of 50 percent for PTSD have not been met. 38 U.S.C. § 1155; 38 C.F.R. § 4.130, Diagnostic Code (DC) 9411.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran had active service from November 2008 to March 2009, from January 2010 to January 2011, and from October 2011 to November 2012.

Increased Rating

The Veteran filed a service connection claim for PTSD while he was in service in September 2012. A May 2013 rating decision granted the service connection for PTSD and assigned an initial rating of 30 percent effective from November 15, 2012, the first day after separation. A June 2016 rating decision increased the Veteran's PTSD rating from 30 percent to 50 percent, effective from July 1, 2014. The Veteran is seeking for a higher rating and an earlier effective date.

Of note, during the pendency of this appeal, the Veteran filed a new application of increased rating claims in December 2018 which included a claim for an increased rating for PTSD. The Veteran was afforded a new VA examination in January 2019 for his PTSD condition, and the agency of original jurisdiction (AOJ) denied a rating in excess of 50 percent for PTSD in March 2019.

Rating in Excess of 30 Percent Prior to July 1, 2014

From November 15, 2012 to June 30, 2014, the Veteran's PTSD is currently rated at 30 percent under Diagnostic Code 9411, which provides the following:

A 50 percent evaluation is assigned when a veteran's PTSD causes occupational and social impairment with reduced reliability and productivity due to such symptoms as: flattened affect; circumstantial, circumlocutory, or stereotyped speech; panic attacks more than once a week; difficulty in understanding complex commands; impairment of short and long-term memory (e.g., retention of only highly learned material, forgetting to complete tasks); impaired judgment; impaired abstract thinking; disturbances of motivation and mood; or difficulty in establishing and maintaining effective work and social relationships. 38 C.F.R. § 4.130, Diagnostic Code 9404.

A 70 percent evaluation is assigned when a veteran's PTSD causes occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to such symptoms as: suicidal ideation; obsessional rituals which interfere with routine activities; speech intermittently illogical, obscure, or irrelevant; near-continuous panic or depression affecting the ability to function independently, appropriately and effectively; impaired impulse control (such as unprovoked irritability with periods of violence); spatial disorientation; neglect of personal appearance and hygiene; difficulty in adapting to stressful circumstances (including work or a work like setting); or an inability to establish and maintain effective relationships. 38 C.F.R. § 4.130, Diagnostic Code 9411.

A 100 percent rating is assigned when a veteran's PTSD causes total occupational and social impairment, due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; danger of hurting self or others; intermittent inability to perform activities of living (including maintenance of minimal hygiene); disorientation to time or place; or, memory loss for names of close relatives, occupation, or own name. 38 C.F.R. § 4.130, Diagnostic Code 9411.

The Veteran was provided a private examination by a licensed psychologist Dr. E. in November 2012, at which the Veteran reported that he had gotten divorced in May 2011. His two young children were living with his ex-wife, but the Veteran maintained contact with them every weekend. The Veteran reported that he was currently unemployed, and living with his parents and brother. He reported that he enjoyed exercising with his brother and maintained contact with two close friends, but he did not have good relationship with his father. He reported that he continued to experience distressing recollections from his service in Afghanistan and had sleep disturbances due to nightmares. He reported mood instability related to anger and demonstrated by his road rage, anxiety around crowds and in public, and depression. He denied suicidal or homicidal ideation, plan or intent. He reported that he was not on any psychotropic medication or psychotherapy, but he had started drinking heavily recently. On examination, the Veteran was oriented to the current location and date, he had good hygiene, his speech was coherent, his thought process was logical, his insight was adequate, and his judgment was fair. He appeared to be guarded, edgy and irritable, especially when the discussing his

combat experience. His mood appeared to be blunted and he laughed inappropriately sometimes. Personality testing scores suggested the presence of severe anxiety related to past traumatic events. Dr. E. noted that the Veteran exhibited paranoid personality traits and mood instability, and opined that the Veteran's PTSD symptoms impaired his ability to function appropriately in social and vocational settings.

The Veteran was provided a VA examination in February 2013, at which the examiner indicated that the Veteran only marginally communicated with the examiner. As such, this examination carries little probative value in assessing the nature and severity of the Veteran's PTSD symptomatology.

The Veteran provided a statement in May 2013 that he tried to attend school when he came back from service, but he failed. He felt uncomfortable around people. He recently lost his job due to a panic break down.

The Veteran was provided another VA examination in July 2014, at which he reported being divorced with two children and he currently living with his girlfriend for a year. He reported that he had good relationship with his girlfriend, although she complained of his isolation and lack of interest in social activities. The Veteran reported that he was a full-time college student now, that he had no close friends, and that he did not like either crowds or loud places. The Veteran reported that he had been unemployed for 12 months, and that he used to work at a cable company for four months but he had hard time dealing with the customers and had several altercations with his bosses. The Veteran complained about poor sleep, frequent nightmares, nervousness with loud noises, panic attacks while driving, and constant worrying and anxiety. He denied depression, obsessions or any suicidal or homicidal ideations, plans or attempts. He reported that he was under psychotropic medication and he only drank 1 to 2 beers every week. The examiner concluded that the Veteran's PTSD caused the occupational and social impairment with reduced reliability and productivity.

The Board finds that, prior to July 1, 2014, the Veteran had exhibited PTSD symptoms causing social and occupational impairment with reduced reliability and productivity, which approximates to the criteria of the 50 percent rating. For example, the private examination in November 2012 found that the Veteran had

severe anxiety, paranoid personality traits and mood instability which impaired his ability to function appropriately in social and vocational settings. The Veteran also reported in May 2013 that he had recently lost his job. At the July 2014 VA examination, the Veteran reported that he had been unemployed for 12 months, and that he had a previous job for four months, but he had a hard time dealing with clients and that he had had verbal altercations with his supervisors. The examiner concluded that the severity of the Veteran's PTSD symptoms was at the level of occupational and social impairment with reduced reliability and productivity, which approximates to the 50 percent rating criteria. As such, a 50 percent rating effective from November 15, 2012, the first day after the Veteran separated from his service is warranted.

Service connection cannot be granted prior to release from active duty. In this case, although the VA received the Veteran claim for service connection for PTSD in September 2012 while he was still in service, his entitlement to service connection for PTSD did not arise until the date he separated from his service, which is November 15, 2012.

Rating in Excess of 50 Percent

As noted above, the VA examinations throughout the appeal have concluded that his PTSD at most supported the criteria for a 50 percent rating.

The Veteran was afforded another VA examination in January 2019, at which he reported that he had shared custody of his two kids with his ex-wife and that the kids were living with him every other week. He reported that he had gotten re-married in December 2017 but had some marital problems with his second wife, and that he had not moved into his wife's house, but lived with his parents instead. He reported that his relationship with his parents was fine and he maintained contact with his older brother over the phone about twice a week. He denied having friends other than his brother, and reported that he spent most of time in his room, watching TV or using his computer. He stated that he used to go to the gym but had discontinued this activity approximately two years earlier. With regard to education, the Veteran reported he attended college from 2014 until late 2015 when he dropped out because he felt that the college was "a little overwhelming". He attended another semester of college in 2017. His grades were Bs, Cs and a

couple of Fs. With regard to his employment, the Veteran reported that the longest period of recent employment was with FedEx where he worked as an unloading employee for a year in 2015, working about 15 hours a week. He reported he did not have performance issues at FedEx, but he did not like the customers. In 2018, he worked for 20-30 hours a week for L.A. Distribution for a couple of months, as a delivery driver. He discontinued the job because it was too demanding, and that he was currently unemployed. He reported that it was hard for him to deal with people, such as his customers and supervisors. On examination, the Veteran demonstrated normal speech and eye contact, normal level of attention retention, average or above average intellectual functioning, and slightly distressed mood. He did not report any current intent of suicide or homicide and did not display any psychotic features during exam. The examiner found that the Veteran's ability to understand and follow instruction and ability to retain instructions and concentration to perform simple tasks were not impaired; his ability to respond properly to coworkers, supervisors or general public was moderately impaired, and his ability to respond properly to changes in work setting is mildly impaired. The examiner concluded that that the severity of the Veteran's PTSD symptoms was at the level of occupational and social imperilment with reduced reliability and productivity.

The VA treatment records do not show PTSD symptoms that are that were worse than those described in the examinations throughout the course of the appeal. For example, treatment records in February 2016 show that the Veteran's was alert, his mood was anxious, with normal attention and restricted affect. His thought process was normal linear and goal oriented, his judgement was good and insight was fair. Records in August 2017 show that the Veteran no longer required specialty mental health treatment after completing previous episode of special mental treatment due to the fact that he declined additional specialty mental treatment, that he had no acute psychiatric needs, and that his current psychotropic medication (trazadone 25- 50 mg) could be refilled by his primary care provider.

The Veteran stated in July 2016 that he had a job but could not continue due to his symptoms. He reported feeling anxious and having panic attacks while driving, and he did not trust other people.

The Veteran's parents provided statements in March 2017 that the Veteran did not attend the wedding of his childhood friend because he had difficulties with crowds, and that he had always wanted to become a pilot and he went to school to get his pilot license but he could not finish the program. His then girl-friend provided statements in March 2017 that the Veteran had a few different types of jobs and they all last about a few months due to his nervousness and panic attacks.

The Board finds that the evidence at the records does not support a 70 percent rating for PTSD which requires the psychiatric symptomatology to cause occupational and social impairment, with deficiencies in *most* areas, such as work, school, family relations, judgment, thinking, or mood, etc. Here, although the evidence show that the Veteran had difficulties in maintaining social relationships with friends and family members, he managed to keep a good relationship with his parents and his brother, to keep his shared custody of his two children, and to get re-married. He had difficulties in completing his college education, but he did manage to finish several semesters of study. Although he has had a series of jobs, the VA examiner in 2019 found that his ability to understand and perform simple task of job was not impaired. The 2012 private examination, the 2014 VA examination and 2016 VA treatment records all indicate that his thought process was logical, his insight was adequate, and his judgment was fair, he was orientated and was able to function independently. As such, evidence suggests that the Veteran's PTSD symptoms causes social and occupational impairment in *some* areas but not *most* areas, and that his overall psychiatric symptomology more approximates to the 50 percent than the 70 percent rating criteria.

Moreover, looking at the types of symptomatology that are required for a rating in excess of 50 percent, the Veteran's mental health treatment records simply do not support a higher rating at this time. For example, while the Veteran has experienced panic attacks, such is contemplated by his 50 percent rating which contemplates weekly panic attacks. The Veteran has not been shown to experience near continuous panic. Likewise, while the Veteran has experienced difficulty with relationships, he has not shown an *inability* to maintain relationships as contemplated by the 70 percent rating. As discussed, the Veteran has gotten remarried during the course of his appeal, maintained a relationship with the children from his first marriage, and kept up a relationship with his brother. The Veteran is routinely noted to be alert and oriented. As such, an objective review of

IN THE APPEAL OF
TOVANY N. FERNANDEZ

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Docket No. 16-33 612

the medical evidence of record fails to show that a rating in excess of 50 percent is warranted for the Veteran's PTSD, and to this extent, the claim is denied. |



MATTHEW W. BLACKWELDER
Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD

Q. Wang, 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).