



**BOARD OF VETERANS' APPEALS**

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF  
**STEVIE E. BOOKER**

Represented by  
Ronald C. Sykstus, Attorney

SS [REDACTED]  
Docket No. 15-20 319

DATE: November 13, 2019

**ORDER**

Entitlement to service connection for a lumbar spine disability is denied.

**REMANDED**

Entitlement to service connection for a right knee disability is remanded.

**FINDING OF FACT**

The medical evidence of record is insufficient to establish a nexus between the Veteran's current lumbar spine disability and his period of service.

**CONCLUSION OF LAW**

The criteria for service connection for a lumbar spine disability have not been met. 38 U.S.C. §§ 1110, 5107(b); 38 C.F.R. §§ 3.303, 3.307, 3.309.

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## **REASONS AND BASES FOR FINDING AND CONCLUSION**

The Veteran served active duty in the United States Army from October 1984 to July 1988.

In February 2019, the Veteran testified before the undersigned Veterans Law Judge at a Travel Board hearing. A copy of the transcript has been associated with the claims file.

In September 2019, the Board remanded the appeal for further development.

### **Service Connection**

Service connection may be granted for disability resulting from disease or injury incurred in or aggravated by active service. 38 U.S.C. §§ 1110, 1131, 5107; 38 C.F.R. § 3.303. The three-element test for service connection requires evidence of: (1) a current disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the current disability and the in-service disease or injury. *Shedden v. Principi*, 381 F.3d 1163, 1166 -67 (Fed. Cir. 2004).

Where a veteran served continuously for ninety (90) days or more during a period of war, or during peacetime service after December 31, 1946, and a disease enumerated by the regulations become manifest to a degree of 10 percent within one year from the date of termination of such service, such disease shall be presumed to have been incurred or aggravated in service, even though there is no evidence of such disease during the period of service. This presumption is rebuttable by affirmative evidence to the contrary. 38 U.S.C. §§ 1101, 1110, 1133; 38 C.F.R. §§ 3.307, 3.309.

#### **1. Service connection for a lumbar spine disability**

The Veteran contends that his lumbar spine disability is due to his period of service.

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The question for the Board is whether the Veteran has a current disability that began during service or is at least as likely as not related to an in-service injury, event, or disease.

The Board concludes that, while the Veteran has a current lumbar spine disability, and the service treatment records indicate diagnoses of paralumbar strains that occurred during service, the preponderance of the evidence weighs against finding that the Veteran's diagnosis of degenerative disc disease began during service or is otherwise related to an in-service injury, event, or disease.

In a February 2014 VA examination, the examiner stated that it was less likely than not that the Veteran's lumbar spine disability was incurred in or caused by the claimed in-service injury. The examiner explained that three complaints of low back pain were reported in the Veteran's service treatment record: one after a sports injury in 1984, and two separate falls in 1985 and 1988. The examiner noted that all the Veteran's complaints were diagnosed as paralumbar strains. The examiner also noted that the 1985 x-ray was negative for injury. The examiner determined that it is less likely than not that strain injuries could cause any significant disc disorders 25 years after the fact. Therefore, the examiner concluded that the Veteran's current lumbar spine disability was not related to his period of service.

In a February 2019 Board hearing, the Veteran reported that he hurt his back in separate incidents during service. He also stated that he was unable to continue treatment during service because only officers received long term care. The Veteran stated that he had gone to the emergency room for care but started dealing with the pain by himself due to the cost. The Veteran reported that he has suffered since that time, but he did not know he could file disability due to a military injury. The Veteran further reported that VA doctors have told him that they could tell it was an old injury.

In February 2019, the Veteran submitted an internet article regarding back spasms and degenerative joint disease.

After review of the record, the Board finds that the evidence is insufficient to establish service connection for a lumbar spine disability. The Board finds the

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February 2014 VA opinion to be highly probative because it reviewed the Veteran's records and provided a thorough rationale for the conclusion. As such, the probative medical evidence of record does not establish a nexus between the Veteran's current diagnosis and his period of service. While the Board acknowledges the Veteran's article submission, the Board notes that it provides only speculative generic statements that contain no evidence that the Veteran in this case has a lumbar spine disability is due to his period of service. Therefore, the article does not, in and of itself, support the claim for service connection. *Wallin v. West*, 11 Vet. App. 509 (1998). Moreover, the evidence does not establish that the Veteran had degenerative disc disease to a compensable degree within a year of separation from service. For these reasons, service connection for a lumbar spine disability is not warranted.

While the Veteran believes that his claimed back disability is related to his period of service, he is only competent to report symptoms and is not competent to opine on the etiology of a lumbar spine disability, as this is a medically complex question. As such, the Board assigns no probative weight to the Veteran's assertions that he has a lumbar spine disability that is due to his period of service.

## **REASONS FOR REMAND**

### **1. Service connection for a right knee disability is remanded.**

The Veteran contends that his right leg disability is due to his period of service.

In a February 2014 VA examination, an examiner determined that it was less likely than not that the Veteran's current right knee disability is due to his period of service. The examiner explained that the service treatment records indicated a single report of right knee injury in sports activity, diagnosed as lateral collateral ligament strain. The examiner noted that his injury was treated conservatively, and he returned to duty after approximately one week. The examiner determined that it was less likely than not that this single ligament contusion/strain was the cause of a degenerative disorder severe enough to require a knee replacement surgery 25 years later.

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The Board notes that a September 1986 service treatment record indicates that the Veteran returned for reevaluation of his right knee following his injury. The Veteran continued to complain of knee pain. The Board also notes a February 2012 VA record in which the Veteran's primary care physician notes that the Veteran's right knee injury appeared to be from an old injury.

The February 2014 VA opinion does not seem to account for this evidence of a continued knee issue. As such, a remand for an addendum opinion to consider such evidence is necessary.

The matters are REMANDED for the following action:

Send the Veteran's claims file, to include a copy of this remand, to an appropriate examiner for an addendum opinion to determine the nature and etiology of his right knee disability. The examiner should consider all other medical records associated with this file during review. The examiner is asked to offer an opinion on the following:

Whether it is at least as likely as not that the Veteran's right knee disability is due to, related to, or the result of his period of service. In making this determination, the examiner is asked to review and address the September 1986 service treatment record and February 2012 VA medical record.

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JENNIFER HWA  
Veterans Law Judge  
Board of Veterans' Appeals

Attorney for the Board

C. Ford

*The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential, and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.*



## 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](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).