BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
HECTOR AHORRIO-TOLEDO
Represented by
Matthew D. Hill, Attorney

Docket No. 190114-1875

DATE: November 21, 2019

ORDER

Entitlement to an effective date earlier than December 27, 2011, for the grant of service connection for status post, degenerative joint disease with spinal stenosis of the lumbar spine, is denied.

Entitlement to an effective date earlier than December 27, 2011, for the grant of service connection for right lower extremity radiculopathy, is denied.

Entitlement to an effective date earlier than December 27, 2011, for the grant of service connection for scar, midline lumbar spine, is denied.

Entitlement to an effective date earlier than May 16, 2012, for the grant of service connection for diagnosed depressive disorder NOS claimed as posttraumatic stress disorder (PTSD), is denied.

Entitlement to an initial rating in excess of 40 percent for status post, degenerative joint disease with spinal stenosis of the lumbar spine is denied.

Entitlement to an initial rating in excess of 20 percent for right lower extremity radiculopathy is denied.

Entitlement to a compensable initial rating for scar, midline lumbar spine, is denied.

Entitlement to an initial rating in excess of 70 percent for diagnosed depressive disorder NOS claimed as PTSD is denied.

Entitlement to a total disability rating based on individual unemployability due to service-connected disability (TDIU) prior to May 16, 2012, is denied.

Entitlement to Dependents' Educational Assistance (DEA) under 38 U.S.C. § Chapter 35, prior to May 16, 2012, is denied.

FINDINGS OF FACT

1. The Veteran did not file a substantive appeal as to the August 30, 2011 statement of the case which denied entitlement to service connection for lumbar spine degenerative joint disease with spinal stenosis.

2. No communication was received from the Veteran between issuance of the August 2011 statement of the case and the December 27, 2011 statement in support of claim, requesting to reopen the previously denied claim for service connection for a low back condition, that may be construed as a formal or informal claim to reopen the previously denied claim for entitlement to service connection for lumbar spine degenerative joint disease with spinal stenosis.

3. No communication was received from the Veteran prior to May 16, 2012, that can be interpreted as an informal or formal claim for entitlement to service connection for an acquired psychiatric disorder.

4. The evidence of record does not show that the Veteran's service-connected lumbar spine disability manifested in ankylosis of the spine or in in intervertebral disc syndrome productive of incapacitating episodes at any time during the relevant rating period.

5. The Veteran's scar, midline lumbar spine is manifested by a scar that has been superficial and linear, has not been painful or unstable, has had an area of less than 929 square centimeters, and has not had any other disabling effects.

6. The Veteran's right lower extremity radiculopathy has not manifested in moderately severe incomplete paralysis of the right sciatic nerve.

7. During the entire period on appeal, the Veteran's service-connected diagnosed depressive disorder NOS claimed as PTSD has been manifested by symptoms productive of functional impairment comparable to occupational and social impairment with deficiencies in most areas.

8. Prior to May 16, 2012, the Veteran's service-connected disabilities did not prevent him from securing or following a substantially gainful occupation.

9. Prior to May 16, 2012, the Veteran did not have permanent and total service-connected disability to warrant DEA benefits.

CONCLUSIONS OF LAW

1. The criteria for entitlement to an effective date earlier than December 27, 2011, for the grant of service connection for status post, degenerative joint disease with spinal stenosis of the lumbar spine have not been met. 38 U.S.C. §§ 5103, 5103A, 5107, 5110; 38 C.F.R. §§ 3.155, 3.160; 38 C.F.R. §§ 3.102, 3.159, 3.400, 20.1104.

2. The criteria for entitlement to an effective date earlier than December 27, 2011, for the grant of service connection for right lower extremity radiculopathy have not been met. 38 U.S.C. §§ 5103, 5103A, 5107, 5110; 38 C.F.R. §§ 3.155, 3.160; 38 C.F.R. §§ 3.102, 3.159, 3.400, 20.1104.

3. The criteria for entitlement to an effective date earlier than December 27, 2011, for the grant of service connection for scar, midline lumbar spine, have not been met. 38 U.S.C. §§ 5103, 5103A, 5107, 5110; 38 C.F.R. §§ 3.155, 3.160; 38 C.F.R. §§ 3.102, 3.159, 3.400, 20.1104.

4. The criteria for entitlement to an effective date earlier than May 16, 2012, for the grant of service connection for diagnosed depressive disorder NOS claimed as PTSD have not been met. 38 U.S.C. §§ 5103, 5103A, 5107, 5110; 38 C.F.R. §§ 3.155, 3.160; 38 C.F.R. §§ 3.102, 3.159, 3.400, 20.1104.

5. The criteria for entitlement to an initial rating in excess of 40 percent for status post, degenerative joint disease with spinal stenosis of the lumbar spine have not

been met. 38 U.S.C. §§ 1155, 5107; 38 C.F.R. §§ 3.102, 3.159, 3.400, 4.3, 4.7, 4.14, 4.21, 4.71a, Diagnostic Code 5237.

6. The criteria for entitlement to an initial rating in excess of 20 percent for right lower extremity radiculopathy have not been met. 38 U.S.C. §§ 1155, 5107; 38 C.F.R. §§ 3.102, 3.159, 3.400, 4.3, 4.7, 4.14, 4.21, 4.124a, Diagnostic Codes 8520.

7. The criteria for entitlement to a compensable initial rating for scar, midline lumbar spine, have not been met. 38 U.S.C. §§ 1155, 5107; 38 C.F.R. §§ 3.102, 3.159, 3.400, 4.3, 4.7, 4.14, 4.21, 4.118, Diagnostic Codes 7801, 7802, 7804, 7805.

8. The criteria for an initial disability rating in excess of 70 percent for service-connected diagnosed depressive disorder NOS claimed as PTSD have not been met. 38 U.S.C. §§ 1155, 5103A, 5107; 38 C.F.R. § 4.130, Diagnostic Code 9434.

9. The criteria for entitlement to a TDIU, prior to May 16, 2012, have not been met. 38 U.S.C. §§ 1155, 5103A, 5107; 38 C.F.R. §§ 3.340, 3.341, 4.16.

10. The criteria for basic eligibility to DEA benefits under Chapter 35, Title 38, of the United States Code, prior to May 16, 2012, have not been met. 38 U.S.C. §§ 3500, 3501; 38 C.F.R. §§ 3.807, 21.3021.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty from June 1975 to December 1987 and from December 1987 to June 1998.

The rating decision on appeal was issued in April 2017. In June 2018, the Veteran elected the modernized review system. 84 Fed. Reg. 138, 177 (Jan. 18, 2019) (to be codified at 38 C.F.R. § 19.2 (d)). The Veteran selected the Higher-Level Review lane when he opted in to the Appeals Modernization Act (AMA) review system by submitting a Rapid Appeals Modernization Program (RAMP) election form. Accordingly, the August 2018 AMA rating decision considered the evidence of record as of the date VA received the RAMP election form. The Veteran timely

appealed this rating decision to the Board and requested that evidence submitted within 90 days of the RAMP selection form be considered along with evidence considered by the Agency of Original Jurisdiction (AOJ).

Entitlement to an Earlier Effective Date

1. Entitlement to an effective date earlier than December 27, 2011 for the grant of service connection for status post, degenerative joint disease with spinal stenosis of the lumbar spine.

2. Entitlement to an effective date earlier than December 27, 2011 for the grant of service connection for right lower extremity radiculopathy.

3. Entitlement to an effective date earlier than December 27, 2011 for the grant of service connection for scar, midline lumbar spine.

The Veteran seeks entitlement to an effective date earlier than December 27, 2011, for the grant of service connection for status post, degenerative joint disease with spinal stenosis, service connection for right lower extremity radiculopathy, and service connection for scar, midline lumbar spine. He has not presented any particular argument as to why earlier effective dates are warranted or suggested more appropriate effective dates with regard to the grants of service connection for low back disability, right lower extremity radiculopathy, and scar.

Regulations that were in effect prior to March 24, 2015, required that an informal claim "must identify the benefit sought." *See* 38 C.F.R. §§ 3.155, 3.160 (2014). The regulations also provided that a claim may be either a formal or informal written communication "requesting a determination of entitlement, or evidencing a belief in entitlement, to a benefit." 38 C.F.R. § 3.1 (p) (2014). The regulations in effect since March 24, 2015, require that claims be submitted on an application form prescribed by the Secretary and do not allow for informal claims not submitted on such a form. *See* 38 C.F.R. §§ 3.155, 3.160 (2015). The Veteran's appeal was pending at the time that the regulations changed. The Board will apply the regulations in effect prior to March 24, 2015, as they allowed for informal claims and are therefore more favorable to the Veteran.

Applicable law and regulations provide that the effective date for a grant of compensation based on an original claim, a claim reopened after final disallowance, or a claim for increase will be the date of receipt of the claim or the date entitlement arose, whichever is the later. 38 U.S.C. § 5110 (a); 38 C.F.R. § 3.400. In *Rudd v. Nicholson*, 20 Vet. App. 296, 299-300 (2006), the Court held that once a decision establishing an effective date becomes final, the only way that such a decision can be revised is if it contains CUE. The Court noted that any other result would vitiate the rule of finality. Accordingly, the Court found that there can be no valid freestanding claim for an earlier effective date.

In this case, a December 2004 rating decision denied the Veteran entitlement to service connection for a low back disability. The Veteran did not submit a notice of disagreement as to the denial of the claim, and new and material evidence was not received within the appeal period. Therefore, the rating decision is final as to the issue. *See* 38 C.F.R. §§ 3.104, 20.302, 20.1103.

The Veteran submitted a petition to reopen the claim for entitlement to service connection for a low back condition in February 2009. The RO reopened the Veteran’s claim and again denied service connection for a low back disability in a May 2009 rating decision. The Veteran filed a timely notice of disagreement as to the issue in March 2010. In August 2011, the RO issued a Statement of the Case (SOC) as to the matter. The cover letter for the August 2011 SOC explained to the Veteran that, to appeal the issue to the Board, he would need to file a substantive appeal within 60 days of the cover letter or within the remainder, if any, of the one-year period from the date of the letter notifying him of the rating decision. The Veteran did not timely submit a substantive appeal as to the issue. Thus, the May 2009 rating decision is therefore final. 38 U.S.C. § 7105; 38 C.F.R. §§ 3.104, 20.302, 20.1103.

Upon careful review of the record, the Board finds that the earliest communication received from the Veteran following issuance of the May 2009 rating decision that could reasonably be construed as a request for a determination of entitlement to, or that evidences a belief in entitlement to, service connection for a low back disability is the VA Form 21-4138, Statement in Support of Claim, that was received on December 27, 2011. As such, December 27, 2011, the date VA received the Veteran’s petition to reopen the previously denied claim for

entitlement to service connection for a low back disability, is the earliest date on which entitlement to service connection for status post, degenerative joint disease with spinal stenosis, service connection for right lower extremity radiculopathy, and service connection for scar, midline lumbar spine, may be granted. *See* 38 C.F.R. § 3.400.

In view of the foregoing, the Board concludes that, December 27, 2011, is the appropriate effective date for the grants of entitlement to service connection for status post, degenerative joint disease with spinal stenosis, service connection for right lower extremity radiculopathy, and service connection for scar, midline lumbar spine. 38 C.F.R. § 3.400. Accordingly, the Board finds that the preponderance of the evidence is against the assignment of an effective date earlier than December 27, 2011, for the grants of entitlement to service connection for status post, degenerative joint disease with spinal stenosis; service connection for right lower extremity radiculopathy; and service connection for scar, midline lumbar spine, and the appeals must be denied. 38 U.S.C. § 5107 (b); *see also Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

4. Entitlement to an effective date earlier than May 16, 2012 for the grant of service connection for diagnosed depressive disorder NOS claimed as PTSD.

The Veteran seeks entitlement to an effective date earlier than May 16, 2012, for the grant of service connection for diagnosed depressive disorder NOS claimed as PTSD. He has not presented any particular argument as to why an earlier effective date is warranted or suggested a more appropriate effective date with regard to the grant of service connection for diagnosed depressive disorder NOS claimed as PTSD.

In this case, VA received a VA Form 21-526b, Veteran's Supplemental Claim for Compensation, on May 16, 2012, claiming entitlement to service connection for PTSD. In an April 2017 rating decision, the RO granted entitlement to service connection for depressive disorder NOS claimed as PTSD, effective May 16, 2012, the date VA received the Veteran's original service connection claim.

The record does not show that any communication was received from the Veteran prior to May 16, 2012, that can be interpreted as an informal or formal claim for

entitlement to service connection for an acquired psychiatric disorder. Therefore, the Board concludes that the record does not show that the Veteran submitted an informal or formal claim for entitlement to service connection for an acquired psychiatric disorder prior to May 16, 2012.

In view of the foregoing, the Board concludes that the preponderance of the evidence is against the appeal for entitlement to an effective date earlier than May 16, 2012, for the grant of service connection for diagnosed depressive disorder NOS claimed as PTSD. Because the preponderance of the evidence is against the appeal, the benefit-of-the-doubt doctrine is not for application, and the appeal must be denied. 38 U.S.C. § 5107 (b); *see also Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

Increased Ratings

Disability ratings are determined by the application of VA's Schedule for Rating Disabilities (Schedule), which is based on the average impairment of earning capacity. Separate diagnostic codes identify the various disabilities. 38 U.S.C. § 1155; 38 C.F.R. Part 4. Pertinent regulations do not require that all cases show all findings specified by the Schedule, but that findings sufficient to identify the disease and the resulting disability and, above all, coordination of the rating with impairment of function will be expected in all cases. 38 C.F.R. § 4.21; *see also Mauerhan v. Principi*, 16 Vet. App. 436 (2002).

When after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding the degree of disability such doubt will be resolved in favor of the claimant. 38 C.F.R. § 4.3. Where there is a question as to which of two ratings shall be applied, the higher rating will be assigned if the disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned. 38 C.F.R. § 4.7.

The Board will consider whether separate ratings may be assigned for separate periods of time based on facts found, a practice known as "staged ratings," in all claims for increased ratings. *Fenderson v. West*, 12 Vet. App. 119, 126-27 (1999).

In rating disabilities of the musculoskeletal system, it is necessary to consider, along with the schedular criteria, functional loss due to flare-ups of pain, fatigability, incoordination, pain on movement, and weakness. *DeLuca v. Brown*, 8 Vet. App. 202 (1995). The functional loss may be due to absence of part, or all, of the necessary bones, joints and muscles, or associated innervation, or other pathology and evidenced by visible behavior of the claimant undertaking the motion. Weakness is as important as limitation of motion, and a part that becomes painful on use must be regarded as seriously disabled. 38 C.F.R. § 4.40. Pain on movement, swelling, deformity, or atrophy of disuse as well as instability of station, disturbance of locomotion, interference with sitting, standing, and weight bearing are relevant considerations for determination of joint disabilities. 38 C.F.R. § 4.45. Painful, unstable, or malaligned joints, due to healed injury, are entitled to at least the minimal compensable rating for the joint. 38 C.F.R. § 4.59; *Burton v. Shinseki*, 25 Vet. App. 1 (2011) (holding that 38 C.F.R. § 4.59 applies to disabilities other than arthritis). However, painful motion alone is not a functional loss without some restriction of the normal working movements of the body. *Mitchell v. Shinseki*, 25 Vet. App. 32, 43 (2011).

5. Entitlement to a disability rating in excess of 40 percent for lumbar spine disability from December 27, 2011, to June 14, 2018.

The Veteran seeks a higher initial rating for his service-connected status post, degenerative joint disease with spinal stenosis of the lumbar spine. The Veteran's service-connected lumbar spine disability is rated as 40 percent disabling under 38 C.F.R. § 4.71a, Diagnostic Code 5243. The applicable rating period is from December 27, 2011, the effective date for the award of service connection for a lumbar spine disability, through the June 14, 2018, the date VA received the Veteran's RAMP opt-in election form.

The AOJ found that the Veteran's lumbar spine disability manifested in forward flexion of the thoracolumbar spine 30 degrees or less and assigned a 40 percent rating under Diagnostic Code 5237.

Diagnostic Code 5243 directs that intervertebral disc syndrome be rated under the General Rating Formula for Diseases and Injuries of the Spine (General Rating Formula). Under the General Rating Formula, a 40 percent rating is assigned for

limitation of forward flexion of the thoracolumbar spine to 30 degrees or less, or favorable ankylosis of the entire thoracolumbar spine . A 50 percent rating is assigned for unfavorable ankylosis of the entire thoracolumbar spine. A 100 percent rating is assigned for unfavorable ankylosis of the entire spine.

Thus, for the Veteran to be entitled to a rating in excess of 40 percent under Diagnostic Code 5243, under the General Rating Formula, the record must show that he has unfavorable ankylosis of at least the entire thoracolumbar spine. For VA compensation purposes, unfavorable ankylosis is a condition in which the entire cervical spine, the entire thoracolumbar spine, or the entire spine is fixed in flexion or extension, and the ankylosis results in one or more of the following: difficulty walking because of a limited line of vision; restricted opening of the mouth and chewing; breathing limited to diaphragmatic respiration; gastrointestinal symptoms due to pressure of the costal margin on the abdomen; dyspnea or dysphagia; atlantoaxial or cervical subluxation or dislocation; or neurologic symptoms due to nerve root stretching. Fixation of a spinal segment in neutral position (zero degrees) always represents favorable ankylosis. 38 C.F.R. § 4.71a, Diagnostic Codes 5235 through 5243, Note (5).

The Board has carefully reviewed the record, and finds that it does not reflect that the Veteran had favorable or unfavorable ankylosis of the entire thoracolumbar spine at any point during the relevant rating period. The medical treatment records do not show a finding or diagnosis of ankylosis of the thoracolumbar spine. The March 2017 VA back conditions examiner indicated that the Veteran does not have ankylosis of the thoracolumbar spine. The Veteran has not contended that he has ankylosis of the thoracolumbar spine. Thus, the Board concludes that the evidence of record does not show that the criteria for entitlement to a rating in excess of 40 percent under Diagnostic Code 5243, under the General Rating Formula, were met at any time during the relevant rating period.

The Board notes that a rating in excess of 40 percent is also available for disabilities of the spine when rated under 38 C.F.R. § 4.71a, Diagnostic Code 5243, relating to intervertebral disc syndrome (IVDS) under the Formula for Rating IVDS Based on Incapacitating Episodes. Under that diagnostic code, a 60 percent rating is assigned for intervertebral disc syndrome with incapacitating episodes having a total duration of at least 6 weeks during the past 12 months. For purposes

of ratings under Diagnostic Code 5243, under the Formula for Rating IVDS Based on Incapacitating Episodes, an incapacitating episode is a period of acute signs and symptoms due to intervertebral disc syndrome that requires bed rest prescribed by a physician and treatment by a physician. *Id*. Note (1). The May 2017 VA examiner noted that the Veteran has IVDS of the thoracolumbar spine. The VA examiner further noted that the Veteran reported episodes of bed rest having a total duration of at least four weeks but less than six weeks during the past 12 months. The VA examiner further noted that the medical history was described by the Veteran.

As such, there is no competent evidence of record indicating that the Veteran had intervertebral disc syndrome with incapacitating episodes having a total duration of at least 6 weeks during the past 12 months at any time during the relevant rating period. Hence, a rating in excess of 40 percent for the Veteran's lumbar spine disability pursuant to Diagnostic Code 5243 under the Formula for Rating IVDS Based on Incapacitating Episodes is not warranted.

The Board therefore finds that the criteria for entitlement to an initial rating in excess of 40 percent for the Veteran's service-connected status post, degenerative joint disease with spinal stenosis of the lumbar spine have not been met at any time during the rating period. Accordingly, there is no basis for staged initial ratings for the Veteran's service-connected lumbar spine disability pursuant to *Hart*, 21 Vet. App. at 519. As the preponderance of the evidence is against the assignment of a higher initial rating, the benefit-of-the-doubt doctrine is not for application, and the claim must be denied. 38 U.S.C. § 5107 (b); *see also Gilbert*, 1 Vet. App. 49.

Neither the Veteran nor his representative has raised any other issues, nor have any other issues been reasonably raised by the record. *See Yancy v. McDonald*, 27 Vet. App. 484, 495 (2016); *Doucette v. Shulkin*, 38 Vet. App. 366, 369-70 (2017) (confirming that the Board is not required to address issues unless they are specifically raised by the claimant or reasonably raised by the evidence of record).

6. Entitlement to a disability rating in excess of 20 percent for right lower extremity radiculopathy from December 27, 2011, to June 14, 2018.

The Veteran seeks a higher initial rating for his service-connected right lower extremity radiculopathy. The Veteran's service-connected right lower extremity radiculopathy is rated as 20 percent disabling under 38 C.F.R. § 4.124a, Diagnostic Code 8520. The applicable rating period is from December 27, 2011, the effective date for the award of service connection for right lower extremity radiculopathy, through the June 14, 2018, the date VA received the Veteran's RAMP opt-in election form.

The Veteran's right lower extremity radiculopathy is rated as 20 percent disabling under 38 C.F.R. § 4.124a, Diagnostic Code 8520, which pertains to paralysis of the sciatic nerve. Under Diagnostic Code 8520, mild incomplete paralysis is rated as 10 percent disabling. Moderate incomplete paralysis is rated as 20 percent disabling. Moderately severe incomplete paralysis is rated as 40 percent disabling. Severe incomplete paralysis with marked muscular atrophy is rated as 60 percent disabling. Complete paralysis is rated as 80 percent disabling. Complete paralysis is described under the rating criteria as "the foot dangles and drops, no active movement possible of muscles below the knee, flexion of knee weakened or (very rarely) lost".

The words "mild," "moderate," and "severe" as used in the various Diagnostic Codes are not defined in the Rating Schedule. Regulations provide that ratings for peripheral neurological disorders are to be assigned based the relative impairment of motor function, trophic changes, or sensory disturbance. 38 C.F.R. § 4.120. Consideration is also given for loss of reflexes, pain, and muscle atrophy. *See* 38 C.F.R. §§ 4.123, 4.124.

The term "incomplete paralysis" indicates a degree of lost or impaired function substantially less than the type picture for complete paralysis given with each nerve, whether due to varied level of the nerve lesion or to partial regeneration. When the involvement is wholly sensory, the rating is for the mild, or at most, the moderate degree. The disability ratings for the peripheral nerves are for unilateral involvement; when bilateral, the ratings combine with application of the bilateral factor. 38 C.F.R. § 4.124a, Note at "Diseases of the Peripheral Nerves." The Note

to 38 C.F.R. § 4.124a establishes a maximum disability rating for conditions that are wholly sensory, as opposed to a minimum disability rating for conditions that are more than wholly sensory. *See Miller v. Shulkin*, 28 Vet. App. 376 (2017).

Turning to the relevant evidence of record, the Veteran was provided a VA examination in March 2017. The VA examiner reviewed the record, interviewed the Veteran and conducted an in-person examination. The Veteran reported constant, moderately severe, sharp pain across the low back that radiates down the right side to his foot. Upon examination, the Veteran had 5 out of 5 muscle strength; no muscle atrophy; and decreased sensation to light touch in the right lower leg/ankle and right foot/toes. The VA examiner noted the Veteran's constant moderate pain in the right lower extremity. The examiner determined that the Veteran's radiculopathy was moderate in severity and involved the right sciatic nerve.

Based on the evidence of record, the Board finds that the criteria for an initial rating in excess of 20 percent for the service-connected radiculopathy of the right lower extremity was not met at any time during the relevant rating period. The medical treatment records show that the Veteran reported constant moderately severe radiating pain. However, they do not indicate that the radiculopathy was more than moderate in severity at any time during the relevant rating periods. The March 2017 VA examination report shows that the Veteran had moderate constant pain in the right lower extremities. However, the Veteran had full muscle strength and normal reflexes in the lower extremity at the examination. He did exhibit some decreased sensation to light tough in the right lower leg/ankle and right lower foot/toes. Additionally, the March 2017 VA examiner described the Veteran's right lower extremity radiculopathy as moderate. Based on the findings noted in the treatment records, the Veteran's descriptions of his service-connected radiculopathy of the right lower extremity, and the findings found on VA examination in March 2017, the Board concludes that the Veteran's service-connected radiculopathy of the right lower extremity has not manifested in moderately severe incomplete paralysis of the right sciatic nerve such that a rating in excess of 20 percent would be warranted. *See* 38 C.F.R. § 4.124a, Diagnostic Codes 8520.

The Board has considered all other potentially applicable Diagnostic Codes, but there is no evidence showing the Veteran has neurological impairment associated with any other peripheral nerves that have not already been service-connected. Therefore, a separate or higher rating under a different Diagnostic Code is not warranted.

The Board therefore finds that the criteria for entitlement to an initial rating in excess of 20 percent for right lower extremity radiculopathy have not been met at any time during the rating period. Accordingly, there is no basis for staged rating of the Veteran's service-connected radiculopathy pursuant to *Hart*, 21 Vet. App. at 519. As the preponderance of the evidence is against the assignment of a higher initial rating, the benefit-of-the-doubt doctrine is not for application, and the claim must be denied. 38 U.S.C. § 5107(b); *see also Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

Neither the Veteran nor his representative has raised any other issues, nor have any other issues been reasonably raised by the record. *See Yancy v. McDonald*, 27 Vet. App. 484, 495 (2016); *Doucette v. Shulkin*, 38 Vet. App. 366, 369-70 (2017) (confirming that the Board is not required to address issues unless they are specifically raised by the claimant or reasonably raised by the evidence of record).

7. Entitlement to a compensable initial for scar, midline lumbar spine from December 27, 2011, to June 14, 2018.

The Veteran seeks a compensable initial rating for his service-connected scar, midline lumbar spine. The Veteran's service-connected scar is rated as noncompensable under 38 C.F.R. § 4.118, Diagnostic Code 7805. The applicable rating period is from December 27, 2011, the effective date for the award of service connection for scar, through June 14, 2018, the date VA received the Veteran's RAMP opt-in election form.

Scars not of the head, face, or neck that are superficial and linear are rated under 38 C.F.R. § 4.118, Diagnostic Codes 7802, 7804, and 7805. Under Diagnostic Code 7802, a 10 percent rating is warranted for a scar that is superficial, linear, and has an area of 929 square centimeters or greater.

Under Diagnostic Code 7804, a 10 percent rating is warranted for one or two scars that are unstable or painful. Higher ratings, up to a maximum of 30 percent, are warranted for additional scars that are unstable or painful. If one or more scars are both unstable and painful, 10 percent is to be added to the rating that is based on the total number of unstable or painful scars. 38 C.F.R. § 4.118, Diagnostic Code 7804, Note (2).

Diagnostic Code 7805 provides that any disabling effects not considered in a rating provided under diagnostic codes 7800 through 7804 should be rated under an appropriate diagnostic code.

The medical treatment records do not show that the Veteran has received treatment for his service-connected scar and do not include descriptions of that scar. They do not show that the scar was painful or unstable, had an area of 929 square centimeters or greater, or had any other disabling effects during the relevant rating period.

The Veteran underwent a VA back conditions examination in March 2017. At the March 2017 VA examination, the VA examiner noted that the Veteran has a scar related to his service-connected lumbar spine disability. The VA examiner further noted that there was no objective evidence that the scar is painful, unstable, have a total area equal to or greater than 39 square cm, or located on the head, face, or neck. The VA examiner reported that the scar was located on the midline of the lumbar spine and had an area of 14 cm long and 0.2 cm wide.

Accordingly, throughout the relevant rating period, the Veteran's service-connected scar has been superficial and linear, not painful or unstable, and had an area of less than 929 square centimeters. There also is no indication in the record that the scar had disabling effects not considered under 38 C.F.R. § 4.118, Diagnostic Codes 7801, 7802, or 7804. Therefore, the Board finds that the criteria for entitlement to a compensable initial rating for the service-connected scar under 38 C.F.R. § 4.118, Diagnostic Codes 7801 through 7805 have not been met at any time during the appeal period.

The Board therefore finds that the criteria for entitlement to a compensable initial rating for scar, midline lumbar spine, have not been met at any time during the

relevant rating period. Accordingly, there is no basis for staged rating of the Veteran's service-connected scar. As the preponderance of the evidence is against the assignment of a compensable initial rating, the benefit-of-the-doubt doctrine is not for application, and the claim must be denied. 38 U.S.C. § 5107(b); *see also Gilbert*, 1 Vet. App. 49.

Neither the Veteran nor his representative has raised any other issues, nor have any other issues been reasonably raised by the record. *See Yancy v. McDonald*, 27 Vet. App. 484, 495 (2016); *Doucette v. Shulkin*, 38 Vet. App. 366, 369-70 (2017) (confirming that the Board is not required to address issues unless they are specifically raised by the claimant or reasonably raised by the evidence of record).

8. Entitlement to a disability rating in excess of 70 percent for diagnosed depressive disorder NOS claimed as PTSD from May 16, 2012, to June 14, 2018.

The Veteran seeks an initial rating in excess of 70 percent for his service-connected diagnosed depressive disorder NOS claimed as PTSD. The Veteran's service-connected depressive disorder is rated as 70 percent disabling under 38 C.F.R. § 4.130, Diagnostic Code 9434. The applicable rating period is from May 16, 2012, the effective date for the award of service connection for depressive disorder NOS, through the June 14, 2018, the date VA received the Veteran's RAMP opt-in election form.

Under Diagnostic Code 9434, for rating major depressive disorder, a 70 percent evaluation is warranted where there is objective evidence demonstrating occupational and social impairment with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood, due to 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, or 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; and the inability to establish and maintain effective relationships. 38 C.F.R. § 4.130, Diagnostic Code 9434.

A maximum 100 percent evaluation is for application when there is total occupational and social impairment, due to such symptoms as: gross impairment in thought processes or communication; persistent delusions or hallucinations; grossly inappropriate behavior; persistent danger of hurting self or others; intermittent inability to perform activities of daily living (including maintenance of minimal personal hygiene); disorientation to time or place; and memory loss for names of close relatives, own occupation, or own name. *Id*.

In rating mental disorders under the General Formula, the Board must conduct a "holistic analysis" that considers all associated symptoms, regardless of whether they are listed as criteria. *Bankhead v. Shulkin*, 29 Vet. App. 10, 22 (2017); 38 C.F.R. § 4.130. The Board must determine whether unlisted symptoms are similar in severity, frequency, and duration to the listed symptoms associated with specific disability percentages. Then, the Board must determine whether the associated symptoms, both listed and unlisted, caused the level of impairment required for a higher disability rating. *Vazquez-Claudio v. Shinseki*, 713 F.3d 112, 114-118 (Fed. Cir. 2013).

The issue in this appeal is whether the Veteran's associated symptoms caused the level of impairment required for a disability rating of 100 percent

The Veteran's VA treatment records; reports for VA examinations conducted in July 2013 and March 2017; private psychiatric examinations conducted in June 2015 and December 2018; and the Veteran's lay statements show that the Veteran's depressive disorder was manifested by symptoms associated with a 70 percent rating, including suicidal ideation, inability to establish and maintain effective relationships, and impaired impulse control, such as unprovoked irritability with periods of violence. The Veteran also had symptoms that are not listed under a specific rating, such as short temper and mood swings.

The Board finds that, in terms of the severity, frequency, and duration, the Veteran's unlisted symptoms most closely approximate the symptoms contemplated by a rating of 70 percent, as they are significantly less severe, less frequent, and shorter in duration than the symptoms contemplated by a 100 percent rating. Those symptoms do not prevent the Veteran from interacting with others at

least occasionally and at least on a superficial level, such as during group therapy. They do not totally impair him socially, as required for a 100 percent rating.

Mental status examinations in the VA treatment records, the private psychiatric examinations and at the VA examinations indicate that the Veteran presented as fully alert and oriented at all times. He was not observed as having altered mental status or illogical or incoherent speech or thought processes. He was also not observed as exhibiting signs of delusion or mania. He did not demonstrate memory loss of names of close relatives, own occupation or own name.

In short, the preponderance of the evidence weighs against finding that the severity, frequency, and duration of the Veteran's symptoms resulted in the level of impairment required for a 100 percent rating. The criteria for a 100 percent or higher rating are not met and the appeal must be denied.

Neither the Veteran nor his representative has raised any other issues, nor have any other issues been reasonably raised by the record. *See Yancy v. McDonald*, 27 Vet. App. 484, 495 (2016); *Doucette v. Shulkin*, 38 Vet. App. 366, 369-70 (2017) (confirming that the Board is not required to address issues unless they are specifically raised by the claimant or reasonably raised by the evidence of record).

9. Entitlement to a TDIU prior to May 16, 2012.

The Veteran seeks entitlement to a TDIU prior to May 16, 2012. A TDIU may be granted where a veteran is unable to secure or follow a substantially gainful occupation as a result of a single service-connected disability ratable at 60 percent or higher, or as a result of two or more service-connected disabilities, provided at least one disability is ratable at 40 percent or higher, and there is sufficient additional service-connected disability to bring the combined rating to 70 percent or more. 38 U.S.C. § 1155; 38 C.F.R. §§ 3.340, 3.341, 4.16(a). Consideration may be given to a veteran's level of education, special training, and previous work experience, but not to his or her age or to impairment caused by nonservice-connected disabilities. *See* 38 C.F.R. §§ 3.341, 4.16, 4.19.

"Substantially gainful employment" is defined as work that is more than marginal and that permits the individual to earn a living wage. *See Moore v. Derwinski*,

1 Vet. App. 356 (1991). Marginal employment is not considered substantially gainful employment.

"Substantially gainful employment" contains economic and noneconomic components. The economic component means "an occupation earning more than marginal income (outside of a protected environment) as determined by the U.S. Department of Commerce as the poverty threshold for one person," and the noneconomic component requires consideration of a veteran's ability to secure or follow that type of employment. *Ray v. Wilkie*, 31 Vet. App. 58, 73 (2019).

The determination of whether a veteran is unable to secure or follow a substantially gainful occupation as a result of service-connected disability is a factual determination rather than a medical question. Therefore, responsibility for the ultimate determination of whether a veteran is capable of securing or following substantially gainful employment is placed on the VA, not a medical examiner. *Geib v. Shinseki*, 733 F.3d 1350, 1354 (Fed. Cir. 2013); *see also* 38 C.F.R. § 4.16; *Floore v. Shinseki*, 26 Vet. App. 376, 381 (2013).

Initially, the Board notes that the April 2017 rating decision granted entitlement to a TDIU and assigned an effective date May 16, 2012. However, in connection with his appeal for a higher initial rating for his lumbar spine disability, the Veteran stated that he could not work due to his lumbar spine disability. Accordingly, the claim for entitlement to a TDIU was raised pursuant to his claim for a higher initial rating for his lumbar spine disability. *Rice v. Shinseki*, 22 Vet. App. 447 (2009). Thus, the award of entitlement to a TDIU effective May 16, 2012 was not a full grant of the benefit sought and the issue of entitlement to a TDIU prior to May 16, 2012 remains on appeal.

Prior to May 16, 2012, the Veteran was service connected for status post, degenerative joint disease with spinal stenosis of the lumbar spine, effective 40 percent from December 27, 2011; right shoulder pain, rated as 20 percent disabling; right lower extremity radiculopathy, rated as 20 percent disabling from December 27, 2011; traumatic arthritis of the right ring finger and right elbow with epicondylitis, rated as 10 percent disabling; fractured nasal bone, rated as 10 percent disabling; right ankle sprain, rated as 10 percent disabling; hemorrhoids, rated as noncompensable; and scar, midline lumbar spine, rated as

noncompensable. From December 27, 2011, through May 16, 2012, the combined evaluation for the Veteran's service-connected disabilities was 70 percent. As such, from December 27, 2011, through May 16, 2012, the schedular percentage requirements for a TDIU were met since the Veteran had one disability ratable at 40 percent or higher, and sufficient additional service-connected disability to bring the combined rating to 70 percent or more.

Turning to the relevant evidence of record, the Veteran submitted VA Forms 21-8940, Veteran's Application for Increased Compensation Based on Unemployability, in November 2015. The Veteran indicated that his PTSD and back condition prevented him from securing or following gainful occupation since July 2007. He further indicated that he had experience as a warehouse manager, building manager and facility manager. The Veteran reported that he two years college education with additional training for logistics.

A December 2011 private treatment record reflects that the Veteran suffered from lumbar spinal stenosis and chronic low back pain.

A February 2012 treatment record reflects that the Veteran was admitted to the impatient mental health level of care due to major depression with suicidal ideation. The Veteran was involuntarily committed because he contacted VA informing a staff member that he was unsafe.

Based on the above, the Board finds that the evidence of record is against a finding of entitlement to a TDIU prior to May 16, 2012. As noted above, service connection was not established for psychiatric disability prior to May 16, 2012. As such, functional impairment due to now service-connected psychiatric disability is not for consideration in adjudicating the appeal for entitlement to a TDIU prior to May 16, 2012. The Board acknowledges that the Veteran has reported that he was unemployable due to his lumbar spine disability. While the Veteran's lumbar spine disability may have prevented the Veteran from performing physical activities, the evidence of record does not illustrate that the Veteran's service-connected lumbar spine disability prevented him from working with or under the supervision of others, from interacting with the public, or from performing any of the other mental tasks required by employment. The Board does not doubt that, prior to May 16, 2012, the Veteran's service-connected disabilities, including low back

disability, right shoulder disability, right lower extremity radiculopathy, right finger and right elbow arthritis with epicondylitis, fractured nasal bone residual, right ankle sprain, hemorrhoids, and midline lumbar spine scar, caused occupational impairment. However, that impairment is compensated by the combined individual schedular ratings assigned prior to May 16, 2012, for those disabilities. *Van Hoose v. Brown*, 4 Vet. App. 361 (1993). In addition, the Board acknowledges that the Veteran's nonservice-connected disabilities, to include nonservice-connected psychiatric disability, further limited his functioning such that he was unable to secure or follow a substantially gainful occupation. However, his nonservice-connected disabilities, to include nonservice-connected psychiatric disability, are not for consideration in determining whether he is entitled to a TDIU. *See* 38 C.F.R. § 4.16. Moreover, the Board finds that the greater weight of the probative evidence is against finding that the Veteran was unable to secure and follow a substantially gainful occupation solely by reason of service-connected disabilities, prior to May 16, 2012.

Accordingly, the Veteran was not unemployable due to his service-connected disabilities, prior to May 16, 2012, and hence TDIU entitlement is not warranted. In reaching this conclusion, the benefit of the doubt has been considered; however, the preponderance of the evidence is against the Veteran's claim. *See Gilbert*, 1 Vet. App. 49.

10. Entitlement to Dependents Educational Assistance under 38 U.S.C. Chapter 35, prior to May 16, 2012.

The Veteran contends that he is entitlement to DEA benefits, prior to May 16, 2012. The Board notes that the Veteran was granted a TDIU from May 16, 2012.

Basic eligibility for DEA benefits under the provisions of 38 U.S.C., Chapter 35 is granted for a child or spouse of a person who has a total disability permanent in nature resulting from a service-connected disability. 38 U.S.C. §§ 3500, 3501. In addition, there are numerous other bases for entitlement to eligibility for DEA, including death due to service-connected disability, which are not relevant here. *See* 38 C.F.R. §§ 21.3020, 21.3021.

The Board finds that, prior to May 16, 2012, the Veteran did not meet the basic eligibility requirements which would provide a basis for an award of DEA at any time during the appeal. Specifically, he was not found to have a permanent and total service-connected disability. The record shows that service connection was in effect for several disabilities, at varying levels of impairment. However, it does not show that any of these conditions were permanent and totally disabling. Without evidence indicating that the Veteran was totally and permanently disabled due to a service-connected disability, prior to May 16, 2012, there is no basis upon which the Board can find that the basic eligibility requirements for DEA benefits, prior to May 16, 2012 were met.

In reaching this decision, the Board is sympathetic to the Veteran's situation. However, it lacks the discretion to award education benefits on an equitable basis and is instead bound to observe the limits on its authority set forth by VA statutes and regulations. *See* 38 U.S.C. § 7104; *McTighe v. Brown*, 7 Vet. App. 29, 30 (1994). Here, the regulatory criteria governing eligibility for DEA benefits under Chapter 35 are clear and specific, and the Board is bound by them. Pursuant to these criteria, the Board finds that there is no basis upon which to grant eligibility for DEA benefits under Chapter 35, prior to May 16, 2012, in this case.

U. R. POWELL
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board B. G. LeMoine, Associate Counsel

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.

If you disagree with VA's decision

Choose one of the following review options to continue your case. If you aren't satisfied with that review, you can try another option. Submit your request before the indicated deadline in order to receive the maximum benefit if your case is granted.

Review option	Supplemental Claim **Add new and relevant evidence**	Higher-Level Review Not Available **Ask for a new look from a senior reviewer**	Board Appeal Not Available **Appeal to a Veterans Law Judge**	Court Appeal **Appeal to Court of Appeals for Veterans Claims**
Who and what	A reviewer will determine whether the new evidence changes the decision.	Because your appeal was decided by a Veterans Law Judge, you cannot request a Higher-Level Review. Please choose a different option for your next review.	You cannot request two Board Appeals in a row. Please choose a different option for your next review.	The U.S. Court of Appeals for Veterans Claims will review the Board's decision. You can hire an attorney to represent you, or you can represent yourself. Find more information at the Court's website: uscourts.cavc.gov
Estimated time for decision	**About 4-5 months**			
Evidence	You must submit evidence that VA didn't have before that supports your case.			
Discuss your case with VA				
Request this option	Submit VA Form 20-0995 Decision Review Request: Supplemental Claim VA.gov/decision-reviews			File a Notice of Appeal uscourts.cavc.gov Note: A Court Appeal must be filed with the Court, not with VA.
Deadline	You have **1 year** from the date on your VA decision to submit VA Form 20-0995.			You have **120 days** from date on your VA decision to file a Court Appeal.
How can I get help?	A Veterans Service Organization or VA-accredited attorney or agent can represent you or provide guidance. Contact your local VA office for assistance or visit VA.gov/decision-reviews/get-help. For more information, you can call the White House Hotline **1-855-948-2311**.			

What is new and relevant evidence?
In order to request a Supplemental Claim, you must add evidence that is both new and relevant. New evidence is information that VA did not have before the last decision. Relevant evidence is information that could prove or disprove something about your case.

VA cannot accept your Supplemental Claim without new and relevant evidence. In addition to submitting the evidence yourself, you can identify evidence, like medical records, that VA should obtain.

What is the Duty to Assist?
The Duty to Assist means VA must assist you in obtaining evidence, such as medical records, that is needed to support your case. VA's Duty to Assist applied during your initial claim, and it also applies if you request a Supplemental Claim.

If you request a Higher-Level Review or Board Appeal, the Duty to Assist does not apply. However, the reviewer or judge will look at whether VA met its Duty to Assist when it applied, and if not, have VA correct that error by obtaining records or scheduling a new exam. Your review may take longer if this is needed.

What if I want to file a Court Appeal, but I'm on active duty?
If you are unable to file a Notice of Appeal due to active military service, like a combat deployment, the Court of Appeals for Veterans Claims may grant additional time to file. The 120-day deadline would start or resume 90 days after you leave active duty. Please seek guidance from a qualified representative if this may apply to you.

What if I miss the deadline?
Submitting your request on time will ensure that you receive the maximum benefit if your case is granted. Please check the deadline for each review option and submit your request before that date.

If the deadline has passed, you can either:

- Add new and relevant evidence and request a Supplemental Claim. Because the deadline has passed, the effective date for benefits will generally be tied to the date VA receives the new request, not the date VA received your initial claim. Or,
- File a motion to the Board of Veterans' Appeals.

What if I want to get a copy of the evidence used in making this decision?
Call 1-800-827-1000 or write a letter stating what you would like to obtain to the address listed on this page.

Motions to the Board
Please consider the review options available to you if you disagree with the decision. In addition to those options, there are three types of motions that you can file with the Board to address errors in the decision. Please seek guidance from a qualified representative to assist you in understanding these motions.

Motion to Vacate
You can file a motion asking the Board to vacate, or set aside, all or part of the decision because of a procedural error. Examples include if you requested a hearing but did not receive one or if your decision incorrectly identified your representative. You will need to write a letter stating how you were denied due process of law. If you file this motion within 120 days of the date on your decision letter, you will have another 120 days from the date the Board decides the motion to appeal to the Court of Appeals for Veterans Claims.

Motion to Reconsider
You can file a motion asking the Board to reconsider all or part of the decision because of an obvious error of effect or law. An example is if the Board failed to recognize a recently established presumptive condition. You will need to write a letter stating specific errors the Board made. If the decision contained more than one issue, please identify the issue or issues you want reconsidered. If you file this motion within 120 days of the date on your decision letter, you will have another 120 days from the date the Board decides the motion to appeal to the Court of Appeals for Veterans Claims.

Motion for Revision of Decision based on Clear and Unmistakable Error
Your decision becomes final after 120 days. Under certain limited conditions, VA can revise a decision that has become final. You will need to send a letter to VA requesting that they revise the decision based on a Clear and Unmistakable Error (CUE). CUE is a specific and rare kind of error. To prove CUE, you must show that facts, known at the time, were not before the judge or that the judge incorrectly applied the law as it existed at the time. It must be undebatable that an error occurred and that this error changed the outcome of your case. Misinterpretation of the facts or a failure by VA to meet its Duty to Assist are not sufficient reasons to revise a decision. Please seek guidance from a qualified representative, as you can only request CUE once per decision.

Mail to:
Board of Veterans' Appeals
PO Box 27063
Washington, DC 20038

Or, fax:
1-844-678-8979