



BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
GLOREUS H. JOHNS

Represented by
Carol J. Ponton, Attorney

██████████
Docket No. 17-36 112

DATE: December 19, 2019

ORDER

Entitlement to an effective date prior to December 4, 2012 for service connection for posttraumatic stress disorder (PTSD), lacking legal merit, is denied.

FINDINGS OF FACT

1. A March 1971 rating decision denied service connection for a nervous condition, an acquired psychiatric disorder.
2. The Veteran did not file a timely notice of disagreement in response to March 1971 rating decision, and new and material evidence was not received within one year of the decision.
3. The undisputed facts show there was no pending, unadjudicated claim to reopen service connection for the acquired psychiatric disorder filed after the March 1971 rating decision and prior to December 4, 2012.
4. On December 4, 2012, VA received the Veteran's claim to reopen service connection for an acquired psychiatric disorder.

CONCLUSION OF LAW

The criteria for an effective date prior to December 4, 2012 for service connection for PTSD have not been met as a matter of law. 38 U.S.C. §§ 5101(a), 5110; 38 C.F.R. §§ 3.1(p), 3.151, 3.155, 3.160(c), 3.400(q)(2), (r).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The Veteran served on active duty from July 1966 to February 1969.

The instant matter is on appeal from a December 4, 2012 claim to reopen service connection for a psychiatric disorder, and an April 2014 rating decision that reopened service connection, granted service connection for PTSD, and assigned an effective date of December 4, 2012 for service connection for PTSD. The Veteran filed a notice of disagreement in February 2015. A statement of the case was issued in May 2017 and the Veteran filed a substantive appeal in July 2017.

Duties to Notify and Assist

As provided for by the Veterans Claims Assistance Act of 2000 (VCAA), VA has a duty to notify and assist claimants in substantiating a claim for VA benefits. 38 U.S.C. §§ 5100, 5103, 5103A, 5107; 38 C.F.R. §§ 3.102, 3.159. With respect to the appeal for an earlier effective date for an acquired psychiatric disorder, resolution of this issue turns on the law as applied to the undisputed facts regarding the date of receipt of claim. As the issue turns on a matter of law, further assistance, such as the further procurement of records, would not assist the Veteran with the appealed issue. As such, no further notice or development under the VCAA is warranted with respect to this issue. *See Mason v. Principi*, 16 Vet. App. 129, 132 (2002); *see also* VAOPGCPREC 5-2004.

Earlier Effective Date than December 4, 2012 for Service Connection for PTSD

The Veteran disagrees with the effective date of December 4, 2012 assigned for service connection for the acquired psychiatric disorder of PTSD. The Veteran

contends that he experienced psychiatric symptoms in service and since separation from service. The Veteran does not contend that he filed a claim to reopen service connection prior to December 4, 2012.

An effective date for a reopened claim is the date of receipt of claim or date entitlement arose, whichever is later, except as provided in 38 C.F.R. § 20.1304(b)(1). 38 U.S.C. § 5110(a); 38 C.F.R. § 3.400(r), (q)(2).

A “claim” is defined as a formal or informal communication, in writing, requesting a determination of entitlement, or evidencing a belief in entitlement to a benefit and VA is required to identify and act on informal claims for benefits. *See* 38 C.F.R. §§ 3.1 (p), 3.155(a); *see also Servello v. Derwinski*, 3 Vet. App. 196, 198 200 (1992). Pursuant to 38 C.F.R. § 3.155, any communication or action indicating intent to apply for one or more VA benefits, including statements from a veteran’s duly authorized representative, may be considered an informal claim. Such an informal claim must identify the benefit sought. 38 C.F.R. § 3.1 (p) defines application as a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement to a benefit. *See Rodriguez v. West*, 189 F.3d. 1351 (Fed. Cir. 1999). The date of receipt of a claim is the date on which a claim, information, or evidence is received by VA. 38 C.F.R. § 3.1(r).

As to what constitutes a claim, a specific claim in the form prescribed by the Secretary must be filed in order for benefits to be paid or furnished to any individual under the laws administered by VA. 38 U.S.C. § 5101(a); 38 C.F.R. § 3.151(a). The term “claim” means a communication in writing requesting a determination of entitlement or evidencing a belief in entitlement to a benefit. 38 C.F.R. § 3.1(p).

The record shows that the Veteran filed an original claim for service connection for a nervous disorder on December 30, 1970. The claim was denied in a March 1971 rating decision. VA sent notice of the decision on April 13, 1971. The Veteran did not file a timely notice of disagreement to appeal the denial of service connection, and new and material evidence was not received within one year of the decision. As a result, the March 1971 rating decision became final. *See* 38 U.S.C. § 7105; 38 C.F.R. §§ 19.52(b), 20.1103.

In the instant appeal stream, the Veteran filed a claim to reopen service connection for PTSD on December 4, 2012. In an April 2014 rating decision, the RO reopened service connection and granted service connection for PTSD, assigning an effective of December 4, 2012 for the grant of service connection for PTSD.

There was no evidence of a pending, unadjudicated claim to reopen service connection for an acquired psychiatric disorder filed after the March 1971 final rating decision and prior to December 4, 2012, and the Veteran does not contend that he filed a claim to reopen service connection prior to December 4, 2012. As the undisputed facts show there was not claim to reopen service connection prior to December 4, 2012, there is no legal basis for an earlier effective date for service connection for an acquired psychiatric disorder.

While the Veteran reports that psychiatric symptoms began in service and have been manifesting since service separation, facts that may well be true as the stressor event was in service and the later diagnosed PTSD has been adjudicated to be related to service; however, the fact that symptoms preceded the claim to reopen has no legal bearing on the determination of an effective date in this case because the claim to reopen service connection was not received until December 4, 2012. Under 38 C.F.R. § 3.400(q)(2) and (r), the effective date for reopened claims is “the date of receipt of claim or date entitlement arose, *whichever is later.*” See 38 C.F.R. § 3.400(q)(2), (r) (emphasis added). The date of the instant claim, December 4, 2012, is later in time than when the Veteran reports that entitlement arose based on symptoms that he was experiencing.

(Continued on the next page)



BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: December 19, 2019

GLOREUS H. JOHNS
633 WALNUT DR
LOGAN, OH 43138

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: CAROL J PONTON, Attorney



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K. Osborne
Deputy Vice Chairman

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For these reasons, the undisputed facts show that there is no basis under the law for establishing an earlier effective date for service connection for PTSD than December 4, 2012, the date of receipt of claim to reopen service connection. As such, the Veteran is already in receipt of the earliest possible effective date, as a matter of law, because December 4, 2012 is the date of receipt of the Veteran's claim to reopen service connection. *See* 38 C.F.R. § 3.400(q)(2),(r).



J. PARKER
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board

D. Costantino, 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.

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. Your local VA office will implement the Board's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. Please note that if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your appeal at the Court because of jurisdictional conflicts. If you file a Notice of Appeal with the Court *before* you file a motion with the Board, the Board will not be able to consider your motion without the Court's permission or until your appeal at the Court is resolved.

How long do I have to start my appeal to the court? You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you*, you will have another 120 days from the date the Board decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time*. Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

How do I appeal to the United States Court of Appeals for Veterans Claims? Send your Notice of Appeal to the Court at:

**Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950**

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: <http://www.uscourts.cavc.gov>, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office.

How do I file a motion for reconsideration? You can file a motion asking the Board to reconsider any part of this decision by writing a letter to the Board clearly explaining why you believe that the Board committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that your letter be as specific as possible. A general statement of dissatisfaction with the Board decision or some other aspect of the VA claims adjudication process will not suffice. If the Board has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified will not be considered. Send your letter to:

**Litigation Support Branch
Board of Veterans' Appeals
P.O. Box 27063
Washington, DC 20038**

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to vacate? You can file a motion asking the Board to vacate any part of this decision by writing a letter to the Board stating why you believe you were denied due process of law during your appeal. See 38 C.F.R. 20.904. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address on the previous page for the Litigation Support Branch, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error? You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address on the previous page for the Litigation Support Branch, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400-20.1411, and *seek help from a qualified representative before filing such a motion*. See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

How do I reopen my claim? You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. See 38 C.F.R. 3.156(a).

Can someone represent me in my appeal? Yes. You can always represent yourself in any claim before VA, including the Board, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: <http://www.va.gov/vso/>. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before the VA, you can get information on how to do so at the Court's website at: <http://www.uscourts.cavc.gov>. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: <http://www.vetsprobono.org>, mail@vetsprobono.org, or (855) 446-9678.

Do I have to pay an attorney or agent to represent me? An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. See 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. See 38 C.F.R. 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

Fee for VA home and small business loan cases: An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. See 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

Filing of Fee Agreements: If you hire an attorney or agent to represent you, a copy of any fee agreement must be sent to VA. The fee agreement must clearly specify if VA is to pay the attorney or agent directly out of past-due benefits. See 38 C.F.R. 14.636(g)(2). If the fee agreement provides for the direct payment of fees out of past-due benefits, a copy of the direct-pay fee agreement must be filed with the agency of original jurisdiction within 30 days of its execution. A copy of any fee agreement that is not a direct-pay fee agreement must be filed with the Office of the General Counsel within 30 days of its execution by mailing the copy to the following address: Office of the General Counsel (022D), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. See 38 C.F.R. 14.636(g)(3).

The Office of the General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of the General Counsel. See 38 C.F.R. 14.636(i); 14.637(d).