



BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
MATTHEW CLIFTON

Represented by
Disabled American Veterans

[REDACTED]
Docket No. 190321-18567

DATE: January 2, 2020

ORDER

Entitlement to an initial compensable rating for hypertension, prior to June 1, 2005, is denied.

Entitlement to an initial rating of 10 percent, but no higher, for hypertension, from June 1, 2005, is granted.

Entitlement to an effective date earlier than November 26, 2014 for the grant of service connection for hypertensive kidney disease is denied.

FINDINGS OF FACT

1. Prior to June 1, 2005, the Veteran's hypertension was not manifested by diastolic pressure predominately 100 or more or systolic pressure predominately 160 or more.
2. From June 1, 2005, the Veteran's hypertension was manifested by diastolic pressure predominately 100 or more, but not 110 or more or systolic pressure predominately 200 or more.
3. The Veteran filed his claim for a kidney condition on November 26, 2014.

CONCLUSIONS OF LAW

1. The criteria for an initial compensable rating for hypertension, prior to June 1, 2005, have not been met. 38 U.S.C. §§ 1155, 5107; 38 C.F.R. §§ 4.1, 4.2, 4.3, 4.7, 4.104, DC 7101.
2. The criteria for an initial rating of 10 percent, but no higher, for hypertension, from June 1, 2005, have been met. 38 U.S.C. §§ 1155, 5107; 38 C.F.R. §§ 4.1, 4.2, 4.3, 4.7, 4.104, Diagnostic Code (DC) 7101.
3. The criteria for an effective date earlier than November 26, 2014 for the grant of service connection for hypertensive kidney disease have not been met. 38 U.S.C. §§ 5107, 5110 (2012); 38 C.F.R. §§ 3.102, 3.159, 3.400 (2018).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Board notes that the rating decision on appeal was issued in January 2019. In July 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 January 2019 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 direct review of the evidence considered by the Agency of Original Jurisdiction (AOJ).

The Veteran served on active duty from September 1979 to December 1985.

Pursuant to the August 2014 Board decision, the Veteran was granted service connection for hypertension, effective February 6, 2009. The Veteran filed a claim for increase for hypertension and also brought a claim for a kidney condition in a November 2014 VA Form 526. Additionally, per the August 2014 Board decision, after claiming clear and unmistakable error, the AOJ granted in a December 2014

Rating Decision an earlier effective date for hypertension effective December 5, 1985, the day after the Veteran separated from service. Thereafter, the AOJ granted service connection for hypertensive kidney disease at 100 percent disabling and increased hypertension at 10 percent disabling effective November 26, 2014.

Increased Rating

When, as here, a Veteran seeks an increased evaluation, it will generally be presumed that the maximum benefit allowed by law and regulation is sought, and it follows that such a claim remains in controversy where less than the maximum benefit available is awarded. *See AB v. Brown*, 6 Vet. App. 35, 38 (1993).

Disability ratings are determined by applying a schedule of ratings that is based on average impairment of earning capacity. Separate diagnostic codes identify the various disabilities. 38 U.S.C. § 1155; 38 C.F.R., Part 4. Each disability must be viewed in relation to its history and the limitation of activity imposed by the disabling condition should be emphasized. 38 C.F.R. § 4.1.

Where, as here, the question to consider is the propriety of the initial evaluation assigned, consideration of the medical evidence since the effective date of the award of service connection and consideration of the appropriateness of a “staged” rating are required. *See Fenderson v. West*, 12 Vet. App. 199, 125-26 (1999). Where entitlement to compensation already has been established and an increase in the disability rating is at issue, it is the present level of disability that is of primary concern. *See Francisco v. Brown*, 7 Vet. App. 55, 58 (1994). 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,” whether it is an initial rating case or not. *See Hart v. Mansfield*, 21 Vet. App. 505, 509-10 (2007).

Where there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria for that rating. Otherwise, the lower rating will be assigned. 38 C.F.R. § 4.7.

Importantly, the evaluation of the same disability under various diagnoses is to be avoided. 38 C.F.R. § 4.14. However, when it is not possible to separate the effects

of the service-connected disability from a nonservice-connected condition, such signs and symptoms must be attributed to the service-connected disability.

Mittleider v. West, 11 Vet. App. 181, 182 (1998); 38 C.F.R. § 3.102.

DC 7101 provides ratings for hypertensive vascular disease (hypertension and isolated systolic hypertension). Hypertensive vascular disease with diastolic pressure predominantly 100 or more, or; systolic pressure predominantly 160 or more, or; minimum evaluation for an individual with a history of diastolic pressure predominantly 100 or more who requires continuous medication for control, is rated 10 percent disabling.

Hypertensive vascular disease with diastolic pressure predominantly 110 or more, or; systolic pressure predominantly 200 or more, is rated 20 percent disabling.

Hypertensive vascular disease with diastolic pressure predominantly 120 or more is rated 40 percent disabling.

Hypertensive vascular disease with diastolic pressure predominantly 130 or more is rated 60 percent disabling.

Prior to June 1, 2005, the medical treatment records indicate blood pressure readings generally under 160 systolic and 100 diastolic. Therefore, a compensable rating for hypertension prior to June 1, 2005 is not warranted and the evidence of record does not demonstrate diastolic pressure *predominately* 100 or more or systolic pressure *predominately* 160 or more.

The Board finds that from June 1, 2005, the Veteran's hypertension was manifested by a diastolic pressure predominantly 100 or more. On June 1, 2005, the Veteran had a blood pressure reading of 211/146. Then a June 2005 treatment record noted the Veteran had a blood pressure of 170/100. Furthermore, the medical treatment records indicate the Veteran was taking blood pressure medication as early as October 2001. From June 1, 2005, medical treatment records note at various times diastolic readings near, at, or over 100, but not predominately at or over 110. Therefore, the Board finds a 10 percent rating is warranted. However, the medical evidence, as noted above, does not demonstrate diastolic pressure *predominately*

110 or more or systolic pressure *predominately* 200 or more to warrant a higher rating.

As such, the Veteran is entitled to a 10 percent rating for hypertension, but no higher, from June 1, 2005.

Effective Date

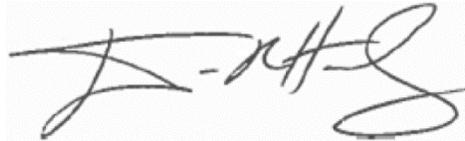
Except as otherwise provided, the effective date of an evaluation and award of compensation based on a claim for service connection or increase will be on the date of receipt of the claim or the date entitlement arose, whichever is the later. 38 U.S.C. § 5110(a) (2012); 38 C.F.R. § 3.400(o)(1) (2018).

During the pendency of the appeal, the definition of what constitutes a valid claim has changed. For the purposes of this case, a claim is a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement to a benefit. 38 C.F.R. § 3.1(p) (2014). The date of receipt shall be the date on which a claim, information, or evidence was received by VA. 38 C.F.R. § 3.1(r).

The Veteran filed his claim for service connection for a kidney condition on November 26, 2014. *See* November 2014 VA Form 526. The AOJ granted service connection for the Veteran's hypertensive kidney condition effective November 26, 2014. The Veteran previously filed service connection claims for a kidney condition that were denied in May 2010 and January 2012 Rating Decisions. However, the Veteran did not appeal these decisions as to his kidney condition and they became final. The record does not contain any other formal claim or statements that amount to an informal claim that have not adjudicated prior to November 26, 2014. The Board notes that medical treatment by itself, to include dialysis or medication, does not amount to an informal claim for service connection. Although the Veteran contends he should retroactively be granted an earlier effective date based on the earlier effective date of service connection for hypertension, governing law and regulations provide no further authority for such a retroactive award.

(Continued on the next page)

As such, the AOJ has assigned the earliest possible effective date provided by law and an earlier effective date is not warranted.



DONNIE R. HACHEY
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board

A. Zheng, 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.



BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: January 2, 2020

MATTHEW CLIFTON
2842 BRIAN LN
MONTGOMERY, IL 60538
USA

Dear Appellant:

A Veterans Law Judge at the Board of Veterans' Appeals made a decision on your appeal.

If you're satisfied with the decision, you don't have to do anything.

What's in the Board decision?

Your Board decision tells you which issue(s) were decided in your appeal. It explains the evidence, laws, and regulations the Veterans Law Judge considered when making their decision and identifies any findings that are favorable to you.

If your decision letter includes a "Remand" section, this means the judge is sending one or more issues in your appeal to your local VA office to correct an error the judge identified while reviewing your case. If an issue is remanded, it hasn't been decided and it can't be appealed yet. You'll receive a decision from the local VA office after they review the issue again.

What if I disagree with the decision?

If you disagree with the judge's decision, you can continue your appeal. See the letter included after your Board decision to learn more about the decision review options available to you.

What if I have questions?

If you have any questions or would like more information, please contact your representative (if you have one) or visit va.gov/decision-reviews/get-help. To track the status of your appeal, visit va.gov/claim-or-appeal-status/.

Sincerely yours,

A handwritten signature in black ink that reads "K. Osborne".

K. Osborne
Deputy Vice Chairman

Enclosures (2)
CC: Disabled American Veterans



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Sincerely yours,

A handwritten signature in black ink that reads "K. Osborne".

K. Osborne
Deputy Vice Chairman

Enclosures (2)
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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.	You cannot request two Board Appeals in a row.	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.
Estimated time for decision	 About 4-5 months	Please choose a different option for your next review.	Please choose a different option for your next review.	Find more information at the Court's website: uscourts.cavc.gov
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