BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
JAMES STEPHEN CURTIN
Represented by
Matthew D. Hill, Attorney

[redacted]
Docket No. 190618-10156
Advanced on the Docket

DATE: February 20, 2020

ORDER

Entitlement to service connection for an acquired psychiatric disorder to include posttraumatic stress disorder (PTSD), an anxiety disorder, bipolar disorder, and depression, is denied.

Entitlement to service connection for chest pain is denied.

The claim for entitlement to a total disability rating based on individual unemployability (TDIU) is denied.

REMANDED

Entitlement to service connection for bilateral hearing loss is remanded.

FINDINGS OF FACT

1. The Veteran has a current acquired psychiatric disorder that has been variously diagnosed throughout the appeal period.

2. The Veteran's claimed stressors, which are non-combat related, have not been verified in the record.

3. An acquired psychiatric disorder, including bipolar disorder, anxiety, and depression, was not evident during service or until many years thereafter and is not shown to have been caused by any in-service event.

4. It has not been shown by competent and probative evidence that the Veteran has ever had a chest pain disability.

5. The Veteran has no service-connected disabilities.

CONCLUSIONS OF LAW

1. The criteria for service connection for an acquired psychiatric disorder, including PTSD, have not been met. 38 U.S.C. § 1110; 38 C.F.R. §§ 3.303, 3.304.

2. The criteria for service connection for chest pain is not established. 38 U.S.C. §§ 1110, 1131, 5103, 5107 (2012); 38 C.F.R. §§ 3.102, 3.303 (2017).

3. The criteria for TDIU have not been met. 38 U.S.C. §§ 1155, 5107 (2012); 38 C.F.R. §§ 3.321, 3.340, 3.341, 4.15, 4.16 (2017).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

On August 23, 2017, the President signed into law the Veterans Appeals Improvement and Modernization Act, Pub. L. No. 115-55 (to be codified as amended in scattered sections of 38 U.S.C.), 131 Stat. 1105 (2017), also known as the Appeals Modernization Act (AMA). This law creates a new framework for Veterans dissatisfied with VA's decision on their claim to seek review. The Board is honoring the Veteran's choice to participate in VA's test program RAMP, the Rapid Appeals Modernization Program

The Veteran served on active duty in the United States Marine Corps from September 1996. These claims were most recently adjudicated in the first instance by the AOJ in December 2017.

The Veteran filed a timely notice of disagreement with the December 2017 decision. Prior to certification to the Board, the Veteran submitted a RAMP election form, selecting the Supplemental Claim lane. Accordingly, a March 2019 RAMP rating decision considered the evidence of record at the time of the submission of the RAMP election form. The Veteran timely appealed the RAMP rating decision to the Board in June 2019 and requested direct review by the Board. The Board has therefore considered all evidence submitted through June 16, 2019.

Service Connection

1. Entitlement to Service Connection for an Acquired Psychiatric Disorder is Denied.

The Veteran is claiming entitlement to service connection for an acquired psychiatric disorder, to include PTSD, an anxiety disorder, bipolar disorder, and depression. After review of the evidence, the Board finds that service connection is not warranted for an acquired psychiatric disorder.

Service connection is granted for disability resulting from disease or injury incurred in or aggravated by active military service in the line of duty. See 38 U.S.C. § 1110 (2012); 38 C.F.R. § 3.303 (2017). "To establish a right to compensation for a present disability, a veteran must show: "(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service" - the so-called "nexus" requirement." Holton v. Shinseki, 557 F.3d 1362, 1366 (Fed. Cir. 2010) *(quoting Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004)).

Service connection for PTSD requires medical evidence diagnosing the condition in accordance with 38 C.F.R. § 4.125(a) (conforming to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM); a link, established by medical evidence, between current symptoms and an in-service stressor; and credible supporting evidence that the claimed in-service stressor occurred. 38 C.F.R. § 3.304(f).

The question of whether a veteran was exposed to a stressor in service is a factual one, and VA adjudicators are not bound to accept uncorroborated accounts of stressors or medical opinions based upon such accounts. *Wood v. Derwinski*, 1 Vet. App. 190 (1991), *aff'd* on reconsideration, 1 Vet. App. 406 (1991). Hence, whether a stressor was of sufficient gravity to cause or support a diagnosis of PTSD is a question of fact for medical professionals and whether the evidence establishes the occurrence of stressors is a question of fact for adjudicators. *Cohen v. Brown*, 10 Vet. App. 128 (1997).

The AOJ found that the Veteran has a current acquired psychiatric disorder that has been variously diagnosed. Therefore, the question in this case is whether a causal relationship exists between the Veteran's acquired psychiatric disorder and his active service, and with respect to PTSD, to the reported stressor.

A review of the Veteran's service treatment records (STRs) does not show any complaints of, or diagnoses of, any acquired psychiatric disorders during service. 38 C.F.R. § 3.304(f)(1). This is not, however, a preclusion to granting service connection for the acquired psychiatric disorder. 38 C.F.R. § 3.303(d).

The Veteran has multiple mental health diagnoses throughout the appeal period, including PTSD, an anxiety disorder, a bipolar disorder, and depression. Specific to PTSD, there still has to be attribution of the PTSD to the Veteran's service, and particularly to a stressor to support this diagnosis. *See Watson v. Brown*, 4 Vet. App. 309, 314 (1993) ("A determination of service connection requires a finding of the existence of a current disability and a determination of a relationship between that disability and an injury or a disease incurred in service.").

The Veteran has reported that he participated in three combat operations during service in Somalia, Burundi, and Rwanda. Service personnel records show the Veteran participated in Operation Continue Hope in Somalia from March 3, 1994 to March 25, 1994 and Operation Distant Runner in Bujumbura from April 4, 1994 to April 18, 1994, however, there is no indication that these deployments were in a combat capacity. Specifically, the Veteran has indicated throughout the appeal period that he was assigned as a helicopter door gunner and observer.

The Veteran's DD214 indicates that his primary specialty was personnel clerk and does not reflect any combat decorations. This is further supported by the chronological record of primary duty's found in the service personnel records. The Board finds that in August 1993, the Veteran was assigned to duty involving flights as a non-crewmember (aerial gunner/observer). However, the Veteran's flight status was involuntarily terminated on October 31, 1993, prior to the above confirmed deployments.

Further, the Joint Services Records Research Center (JSRRC) was contacted to try and verify the Veteran's alleged stressor in service. In May 2017, the Agency of Original Jurisdiction (AOJ) made a formal finding of a lack of information required to verify stressors associated with a claim for service connection for PTSD. The memorandum detailed the efforts that had been made to verify the alleged stressor and indicated that the Veteran failed to provide requested evidence that may have assisted in the search.

In December 2017, the Veteran underwent a VA examination to determine the etiology of any mental health disabilities. The VA examiner diagnosed the Veteran with Bipolar I disorder, moderate, most recent episode depressed, currently in partial remission and alcohol use disorder, moderate, in early remission.

The VA examiner indicated that the Veteran did not meet the criteria for PTSD, in part, because it was unclear how close to danger the Veteran felt. Specifically, the Veteran reported that he was not in any direct combat situation. The VA examiner further noted that during the examination the Veteran first denied being fired upon nad later said he was shot at while high in a helicopter. The VA examiner added that the Veteran did not meet the other criteria for PTSD, for example, the Veteran only reported one flashback many years prior. The Veteran reported no symptoms from Criterion C or D.

The VA examiner also opined that the Veteran's Bipolar Disorder was less likely than not related to his military service. The rationale provided was that the bipolar disorder did not manifest until 10 years after discharge from the service and connecting his service activities to the current mental health status would be mere speculation.

The Board finds that the December 2017 VA examination highly probative of no nexus between the Veteran's current disabilities and service because it contains a clear conclusion that is supported by the Veteran's service treatment records, as well, as the private treatment records throughout the appeal period. *See Nieves-Rodriguez v. Peake*, 22 Vet. App. 295, 301 (2008). Specifically, the record supports that the Veteran's acquired psychiatric disorder had its onset many years after service and the Veteran has not indicated that the symptoms began during service.

The Board notes November 2018 private opinion that diagnosed PTSD based on the reported stressor, using the DSM-V; however, even conceding the diagnosis, the Board finds that service connection is not warranted for PTSD as there is no corroborating evidence of the claimed stressor's occurrence in service.

The preponderance of the evidence is against this claim of entitlement to service connection for an acquired psychiatric disorder, to include PTSD. There are times when independent corroboration of a claimed stressor is not required, such as when the incident in question occurred in combat or in response to the Veteran's fear of hostile military or terrorist activity, or when he was a prisoner of war (POW) or is alleging he was personally assaulted or suffered military sexual trauma (MST). *See* 38 C.F.R. § 3.304(f)(2), (3), (4) and (5). But this is not the situation here. The private examiner did not opine on any other mental health disorders.

Next, while a lay witness is competent to testify as to the occurrence of an in-service injury or incident where that issue is factual in nature, the Board finds that the lay statements submitted by the Veteran do not constitute competent evidence of the claimed stressor's occurrence. *West v. Brown*, 7 Vet. App. 70 (1994); *Zarycki v. Brown*, 6 Vet. App. 9 (1993). The only available evidence of the claimed stressor's occurrence is the written and oral testimony from the Veteran, himself. While the Board may rely on other evidence, as outlined in the subparts of 38 C.F.R. § 3.304(f) mentioned (subparts (2), (3), (4) and (5)), there has not been any other evidence corroborating that the stressor in this particular instance occurred. Thus, the Veteran has failed to establish the occurrence of the necessary inciting or precipitating event, as support for his eventual PTSD diagnosis.

The Board does not doubt that the Veteran is sincere in his claim. Although the claims file includes a diagnosis of PTSD, a diagnosis alone does not constitute sufficient evidence for the grant of service connection. No verified stressor exists. Thus, service connection for PTSD is not warranted. Additionally, no medical professional has provided a nexus between any other diagnosed mental health disabilities and the Veteran's military service. As the preponderance of the evidence is against the claim, the benefit-of-the-doubt doctrine does not apply, and the claim of service connection for PTSD is denied. 38 U.S.C. § 5107(b); *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

2. Entitlement to Service Connection for Chest Pain is Denied.

The Veteran contends that service connection is warranted for chest pain. After review of the lay and medical evidence of record the Board finds that service connection for chest pain is not warranted.

Service connection may be granted for a disability resulting from disease or injury incurred in or aggravated by service. 38 U.S.C. §§ 1110, 1131; 38 C.F.R. § 3.303(a). Service connection may also be granted for any disease diagnosed after discharge when all of the evidence establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d).

To establish a right to compensation for a present disability, a Veteran must show: "(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service" - the so-called "nexus" requirement. *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004).

Under applicable criteria, VA shall consider all lay and medical evidence of record in a case with respect to benefits under laws administered by VA. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, VA shall give the benefit of the doubt to the claimant. 38 U.S.C. § 5107(b); *see also Gilbert v. Derwinski*, 1 Vet. App. 49, 55 (1990).

A review of the Veteran's service treatment records reveal no reports of, or treatment for, chest pain. The Veteran denied chest pain on the entrance and exit Report of Medical History's and on examination no disability with any attributed chest pain was found.

In May 2009, the Veteran reported to an emergency department with chest pain for three days after binging alcohol and smoking cigarettes. A chest x-ray was normal with no indication of myocardial infarction. He was diagnosed with chest pain and discharged. In August 2011, the Veteran again reported to the emergency department with chest pain after using cocaine and alcohol. He reported no symptoms during the visit and was diagnosed with chest pain, an anxiety reaction, and bleeding. In July 2016, the Veteran reported chest pain, palpitations, and shortness of breath with exercise, but no other cardiovascular issues. A prescription for anxiety medication was issued.

The existence of a current disability is the cornerstone of a claim for VA disability compensation. 38 U.S.C. § 1110; *Degmetich v. Brown*, 104 F.3d. 1328, 1332 (1997) (holding that interpretation of sections 1110 and 1131 of the statute as requiring the existence of a present disability for VA compensation purposes cannot be considered arbitrary). Evidence must show that the Veteran currently has the disability for which benefits are being claimed. In the absence of proof of a present disability due to disease or injury that occurred in service, there can be no valid claim. *Brammer v. Derwinski*, 3 Vet. App. 223, 225 (1992); *Sanchez-Benitez v. Principi*, 259 F.3d. 1356 (2001). A medical diagnosis is not categorically required to establish the current disability element of a service connection claim. See *Saunders v. Wilkie*, 886 F.3d 1356, 1368 (Fed. Cir. 2018). Rather, this requirement may be satisfied by showing that the Veteran has symptoms causing functional impairment.

The requirement for a current disability is satisfied when a claimant has a disability either at the time a claim for VA compensation is filed, or at any time during the pendency of that claim. A claimant may be granted service connection even though the disability resolves prior to the Secretary's adjudication of the claim. *McClain v. Nicholson*, 21 Vet. App. 319, 321 (2007).

Therefore, entitlement to service connection for chest pain is denied on a direct basis. The Veteran was not diagnosed as having a disability that supports a separate diagnosis of chest pain. Although he may be competent to relate observations of chest pain, he is not competent to assess a disability of the heart. *See Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007). Moreover, this does not appear to be a situation where there is functional impairment without a formal diagnosis. *See Saunders*, 886 F.3d at 1361.

Further, to the extent the Veteran contends that the chest pain is directly related to the claimed acquired psychiatric disability, the claim must also be denied. For the reasons discussed in detail above, the Board finds that service connection for an acquired psychiatric disability is not warranted, and is to be denied; therefore, a threshold legal requirement of primary service-connected disability for a valid claim of secondary service connection has not been met. *See* 38 C.F.R. § 3.310. Accordingly, the claim of service connection for chest pain on a secondary basis is legally insufficient and must be denied as lacking legal merit. *See Sabonis v. Brown,* 6 Vet. App. 426, 430 (1994) (where the law is dispositive, the claim must be denied due to a lack of legal merit). Accordingly, the claim must be denied.

3. Entitlement to a TDIU is Denied.

Total disability is considered to exist when there is any impairment which is sufficient to render it impossible for the average person to follow a substantially gainful occupation. Total disability may or may not be permanent. 38 C.F.R.

§ 3.340(a)(1) (2016). Total ratings are authorized for any disability or combination of disabilities for which the Rating Schedule prescribes a 100 percent evaluation. 38 C.F.R. § 3.340 (a)(2).

A TDIU may be assigned when the disabled veteran is, in the judgment of the rating agency, unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities. If there is only one such disability, it must be rated at 60 percent or more; if there are two or more disabilities, at least one disability must be rated at 40 percent or more, with sufficient additional disability to bring the combined rating to 70 percent or more. 38 C.F.R. § 4.16 (a). Even

when the percentage requirements are not met, entitlement to a total rating, on an extraschedular basis, may nonetheless be granted, in exceptional cases, when the veteran is unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities. 38 C.F.R. §§ 3.321 (b), 4.16(b).

As there are no service-connected disabilities, the claim of TDIU must be denied as a matter of law. *See Sabonis v. Brown*, 6 Vet. App. 426, 430 (1994).

REASONS FOR REMAND

1. Service Connection for Bilateral Hearing Loss is Remanded.

The Board finds a duty to assist error occurred prior to the February 15, 2019 opt-in to the RAMP program such that remand is warranted to correct the deficiencies. Specifically, the Board finds evidence that an adequate examination is necessary to properly fulfill the duty to assist.

When VA undertakes to provide a VA examination, it must ensure that the examination is adequate. *Barr v. Nicholson*, 21 Vet. App. 303, 312 (2007). The Veteran underwent a VA examination hearing loss examination in January 2018. The VA examiner indicated that an opinion could not be offered be rendered without speculation because no hearing exams were found in the Veteran's service treatment records. However, a review of the service treatment records shows multiple hearing tests during the Veteran's period of active duty service. Accordingly, the Board finds that a new VA medical examination and opinion is necessary. 38 C.F.R. § 3.159(c)(4) (2017).

The matters are REMANDED for the following action:

1. Schedule the Veteran for a VA audiological examination to determine the etiology of any current bilateral hearing loss and tinnitus. After reviewing the claims file, the VA examiner should offer the following opinion:

Is it at least as likely as not (50 percent or greater probability) that any current hearing loss had their onset in service or is otherwise related to his active service, to include noise exposure?

In rendering the opinions requested above, the VA examiner should comment on the Veteran's in-service hearing exams, including the hearing conservation documents.

H. SEESEL
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board C. Teague, Associate Attorney

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