



BOARD OF VETERANS' APPEALS
FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
GRANT STEELE

Represented by
Brian D. Hill, Attorney

[REDACTED]
Docket No. 190821-66731

DATE: August 24, 2020

ORDER

Service connection for an acquired psychiatric disorder is granted.

A total disability based on individual unemployability (TDIU) is denied.

FINDINGS OF FACT

1. The Veteran had active service from June 1973 to June 1976.
2. The Veteran's current psychiatric disorder, diagnosed as a major depressive disorder, has been causally related to service.
3. The Veteran does not meet the schedular criteria for TDIU.

CONCLUSIONS OF LAW

1. An acquired psychiatric disorder was incurred in service. 38 U.S.C. §§ 1110, 1131, 5103(a), 5103A, 5107 (2012); 38 C.F.R. §§ 3.159, 3.303 (2019).
2. The criteria for a TDIU is not currently met. 38 U.S.C. §§ 1155, 5107 (2012); 38 C.F.R. §§ 3.102, 3.340, 3.341, 4.16 (2019).

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REASONS AND BASES FOR FINDINGS AND CONCLUSION

The President signed into law the Veterans Appeals Improvement and Modernization Act, Pub. L. No. 115-55, 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. This decision has been written under the AMA guidelines.

Service Connection for an Acquired Psychiatric Disorder

Service connection may be granted directly as a result of disease or injury incurred in service based on nexus using the following three-element test: (1) the existence of a current 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 in or aggravated by service. *See* 38 C.F.R. § 3.303(a), (d); *Holton v. Shinseki*, 557 F.3d 1363, 1366 (Fed. Cir. 2009).

As an initial matter, in the November 2018 rating decision, the Agency of Original Jurisdiction (AOJ) rendered favorable findings that the Veteran had been receiving mental health treatment since 1999 and that three private opinions had determined that an acquired psychiatric disorder was incurred in service. Under applicable law, favorable findings are binding on the Board.

Turning to the evidence, the Veteran was diagnosed with depression in 1999. Therefore, a current disorder is shown, and the first element of service connection is met.

As to an in-service incurrence, service treatment records (STRs) are absent of complaints, diagnoses, or treatment of an acquired psychiatric disorder. Specifically, the Veteran sought in-service treatment for a face rash and back pain, among others, but did not report any psychiatric symptoms.

In a March 2015 statement, the Veteran reported two in-service events that he attributed to his psychiatric symptoms. The first was that while he was stationed in Germany, he witnessed soldiers doing drugs in the barracks and a young woman screaming for help. He later reported that she had overdosed and he felt like he

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should have done something to help her. The second incident was that he saw another soldier get hit by a car.

Despite the Veteran's statements, a May 2015 U.S. Army and Joint Research Records Center (JSRRC) request could not corroborate these stressors. Nevertheless, he provided a February 2020 buddy statement from fellow soldier JR who reported that she was stationed with the Veteran in Germany in 1975 and that he recalled to her witnessing the soldier get hit by a car. As such, the second element of service connection is met.

As to nexus, the AOJ rendered a favorable finding that the Veteran had submitted three private opinions stating that an acquired psychiatric disorder was incurred in service. There are no contradictory medical opinions. Based on the above, the evidence weighs in favor of a finding that a current psychiatric disorder was the result of the incidents incurred in service. Therefore, the appeal is granted.

TDIU

It is the established policy of VA that all veterans who are unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities shall be rated as totally disabled. 38 C.F.R. § 4.16. Substantially gainful employment is that employment that is ordinarily followed by the nondisabled to earn their livelihoods with earnings common to the particular occupation in the community where the veteran resides. *Moore v. Derwinski*, 1 Vet. App. 356 (1991). Marginal employment will not be considered substantially gainful employment. 38 C.F.R. § 4.16(a).

A TDIU may be assigned, if the scheduler rating is less than total, when the disabled person is, in the judgment of the rating agency, unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities, provided that if there is only one such disability it is ratable at 60 percent or more, and that if there are two or more such disabilities at least one is ratable at 40 percent or more and the combined rating is 70 percent or more. 38 C.F.R. § 4.16(a).

The central inquiry is whether the veteran's service-connected disabilities alone are of sufficient severity to produce unemployability. *Hatlestad v. Brown*, 5 Vet. App. 524 (1993). Neither nonservice-connected disabilities nor advancing age may

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be considered in the determination. 38 C.F.R. §§ 3.341, 4.19; *Van Hoose v. Brown*, 4 Vet. App. 361 (1993).

As an initial matter, the Veteran's highest level of education is two years of college and he last worked full time in 1998 as a barber.

Based on the Veteran's selection of the Evidence Lane for AMA review, the Board can only consider the evidence of record at the time of the rating decision on appeal, the evidence submitted by the Veteran with the notice of disagreement, and the evidence submitted within 90 days of the notice of disagreement.

A review of that evidence reflects that the Veteran is not service connected for any disabilities. As he does not meet the minimum schedular requirement for TDIU during the evidentiary period, the appeal is denied.

Finally, the Veteran has not raised any other issues, nor have any other issues been reasonably raised by the record for the Board's consideration. See *Doucette v. Shulkin*, 28 Vet. App. 366 (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).



L. HOWELL
Veterans Law Judge
Board of Veterans' Appeals



Attorney for the Board

D. Ragofsky, Attorney Advisor

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.	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