



BOARD OF VETERANS' APPEALS
FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
RALPH SANTOS

Represented by
Carol J. Ponton, Attorney

SS [REDACTED]
Docket No. 190905-29871

DATE: October 1, 2020

ORDER

Entitlement to an earlier effective date for the award of basic eligibility for dependents' educational assistance (DEA) is dismissed as moot.

Entitlement to an effective date earlier than May 24, 2019, for the award of 70 percent rating for posttraumatic stress disorder (PTSD) is denied.

FINDINGS OF FACT

1. An earlier effective date of March 12, 2018 for basic eligibility for DEA was granted in a March 2020 rating decision that was issued after the Veteran's September 2019 VA Form 10182 notice of disagreement.
2. The Veteran filed claim for increased rating for PTSD in May 2019.
3. Prior to May 24, 2019, it was not factually ascertainable that the Veteran's PTSD warranted an increased rating.

CONCLUSIONS OF LAW

1. The appeal for entitlement to an earlier effective date for the award of basic eligibility for DEA is dismissed as moot. 38 U.S.C. § 7105 (d); 38 C.F.R. §§ 3.1, 3.151, 3.340, 3.341, 3.400.

2. The criteria for an effective date earlier than May 24, 2019, for the award of a 70 percent rating for PTSD are not met. 38 U.S.C. §§ 5107, 5110, 7104, 7105; 38 C.F.R. §§ 3.102, 3.151, 3.155, 3.156, 3.400, 4.130, Diagnostic Code (DC) 9411.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty from July 1972 to July 1992.

On August 23, 2017, 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 consistent with the new AMA framework.

This case is before the Board of Veterans' Appeals (Board) on appeal from a June 2019 AMA rating decision issued by the Department of Veterans Affairs (VA) Regional Office (RO). The AOJ granted an increased 70 percent rating for PTSD effective May 24, 2019 and granted DEA benefits effective May 24, 2019. In September 2019, the Veteran appealed the decision to the Board, wherein he selected the Evidence Submission lane. Therefore, in deciding the current appeal the Board will consider the evidence before the RO at the time of the June 2019 rating decision as well as any evidence submitted within 90 days of the September 2019 appeal.

1. Entitlement to an earlier effective date for the award of basic eligibility for dependents' educational assistance (DEA) is dismissed as moot.

During the pendency of this appeal, an earlier effective date of March 12, 2018 was granted in a March 2020 rating decision, thereby constituting a full grant of the benefits sought on appeal concerning this claim. The Veteran had filed a VA Form

10182 notice of disagreement with the effective date in September 2019. The Veteran did not contest the effective date issued in the March 2020 rating decision.

The Board's jurisdiction is predicated upon an appeal having been filed on an issue or issues in controversy.

As the Board already has adjudicated the Veteran's claim for entitlement to an earlier effective date for DEA benefits, in the prior March 2020 decision mentioned, the issue has been rendered moot. As there remains no case or controversy concerning whether the Veteran is entitled to this benefit sought, the appeal for this claim must be dismissed since there is no remaining case or controversy within the Board's jurisdiction. 38 U.S.C. § 7105 (d).

2. Entitlement to an effective date earlier than May 24, 2019, for the award of 70 percent rating for posttraumatic stress disorder (PTSD)

The Veteran contends that the assigned 70 percent rating should have an effective date earlier than May 24, 2019. Based upon review of the evidence, the Board finds that an earlier effective date for the award of 70 percent is not warranted.

In general, the effective date of an award based on an original claim or a claim reopened after final adjudication of compensation shall be fixed in accordance with the facts found, but shall not be earlier than the date of the receipt of the application. 38 U.S.C. § 5110 (a); 38 C.F.R. § 3.400. Generally, the effective date of an award of disability compensation based on an original claim shall be the date of receipt of the claim or the date entitlement arose, whichever is later. 38 U.S.C. § 5110 (a); 38 C.F.R. § 3.400.

The Board notes that an exception to the general rule exists for increased rating claims. In a claim for increased compensation, the effective date may date back as much as one year before the date of the application for increase if it is factually "ascertainable that an increase in disability had occurred" within that timeframe. 38 U.S.C. § 5110 (b)(2); 38 C.F.R. § 3.400 (o)(2); see also *Gaston v. Shinseki*, 605 F.3d 979 (Fed. Cir. 2010); *Hazan v. Gober*, 10 Vet. App. 511 (1997).

Prior to March 24, 2015, a “claim” was either a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement to a benefit. See 38 C.F.R. § 3.1 (p). Effective March 24, 2015, however, all claims must be submitted on a form prescribed by the Secretary of VA.

By way of history, the Veteran was granted service connection for PTSD in a February 2018 rating decision, evaluated as 30 percent disabling effective March 2017. The Veteran filed a claim for increased rating in May 2019 and in a June 2019 rating decision, the RO granted an increased 70 percent rating effective May 24, 2019. Subsequently, an April 2020 rating decision granted an earlier effective date of February 13, 2017 for the grant of service connection for PTSD based on clear and unmistakable error.

The February 2018 VA examination report that was the basis for the assigned 30 percent rating for PTSD showed that the Veteran had depressed mood, mild memory loss, anxiety, and chronic sleep impairment, difficulty establishing and maintaining effective work and social relationships. The examiner determined that the Veteran’s PTSD resulted in occupational and social impairment with occasional decrease in work efficiency and intermittent periods of inability to perform occupational tasks (although generally functioning satisfactorily, with routine behavior, self-care, and conversation normal).

The June 2019 VA examination report that was the basis for the increased 70 percent rating showed that the Veteran exhibited the following symptoms: forgetting names; suspiciousness; depressed mood; disturbances of motivation and mood; retention of only highly learned material; mild memory loss; forgetting recent events; chronic sleep impairment; forgetting to complete tasks; panic attacks (weekly); difficulty in adapting to stressful circumstances, work, and work-like setting; inability to establish and maintain effective relationships; impairment of short- and long-term memory; intermittent inability to perform maintenance of minimal personal hygiene; anxiety; difficulty in establishing and maintaining effective work and social relationships; intermittent inability to perform activities of daily living and forgetting directions. The examiner determined that the Veteran’s PTSD caused occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood.

VA treatment records from 2018 to 2019, to include May 2018 records, show that the Veteran received treatment for PTSD, to include therapy sessions and medication, and experienced symptoms of irritability and anxiety. No homicidal/suicidal intent or ideation was noted.

Review of the evidence of record does not show that it was factually ascertainable that the Veteran's service-connected PTSD met the criteria for the assignment of a 70 percent rating in the year prior to the date of claim, as his symptoms did not more nearly approximate symptoms such as those demonstrating a higher level of impairment. Therefore, entitlement to an effective date earlier than May 24, 2019 for the assignment of a 70 percent disability rating for PTSD is denied. 38 U.S.C. § 5110; 38 C.F.R. § 3.400.



David Gratz
Acting Veterans Law Judge
Board of Veterans' Appeals



Attorney for the Board

A. Hemphill

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