BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
CHARLES E. ELLINGTON Docket No. 190828-26784
Represented by
Nicholas Lee Simpson, Attorney

DATE: February 16, 2021

ORDER

An effective date earlier than November 12, 2015 for the grant of service connection for bilateral pes planus with bilateral plantar fasciitis and heel spurs is denied.

An effective date earlier than November 12, 2015, for the grant of a 70 percent rating for service-connected posttraumatic stress disorder with persistent depressive disorder (PTSD) (also claimed as mood, emotion, and sleep disturbance) is denied.

FINDINGS OF FACT

1. Since the final September 2010 rating decision, the first communication from the Veteran to VA evidencing an intent to reopen the claim of service connection for bilateral pes planus with bilateral plantar fasciitis and heel spurs was received on November 12, 2015.

2. Prior to November 12, 2015, it was not factually ascertainable that an increase in severity of the Veteran's PTSD had occurred.

CONCLUSIONS OF LAW

1. The criteria for an effective date earlier than November 12, 2015, for the grant of service connection for bilateral pes planus with bilateral plantar fasciitis and heel spurs have not been met. 38 U.S.C. § 5110; 38 C.F.R. §§ 3.157, 3.160, 3.400, 3.816.

2. The criteria for an effective date earlier than November 12, 2015, for the grant of a 70 percent rating for PTSD have not been met. 38 U.S.C. § 5110; 38 C.F.R. § 3.400.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty from June 1968 to March 1970.

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. The Board is honoring the Veteran's choice to participate in VA's test program, RAMP, the Rapid Appeals Modernization Program.

The Veteran selected the Higher-Level Review lane when he opted into the AMA review system in May 2018 by submitting a Rapid Appeals Modernization Program (RAMP) election form. Thereafter, the August 2018 higher level review rating decision considered the evidence of record as of the date VA received the RAMP election form and denied entitlement to an effective date earlier than November 12, 2015 for the award of service connection for bilateral pes planus with bilateral plantar fasciitis and the assignment of a 70 percent rating for service-connected PTSD. The Veteran timely appealed this RAMP rating decision to the Board and requested direct review of the evidence considered by the Agency of Original Jurisdiction (AOJ).

Effective Date Claims

Unless specifically provided otherwise, the effective date of an award of compensation shall be the date of receipt of claim or the date entitlement arose, whichever is later. 38 U.S.C. § 5110 (a); 38 C.F.R. § 3.400 (b)(2).

When there is a prior final decision in the claims file and a later reopened claim results in a grant of the benefit, the general rule for effective dates for reopened claims applies. In such cases the effective date cannot be earlier than the subsequent claim to reopen. 38 U.S.C. §§ 5110 (a), (i), 5108; 38 C.F.R. $ 3.400(q), (r); *Sears v. Principi*, 349 F.3d 1326 (Fed. Cir. 2003). The award can be made effective no earlier than the date of the new application. 38 U.S.C. §§ 5110 (a), (i), 5108; 38 C.F.R. §§ 3.156 (c), 3.400(q), (r).

However, an exception to this rule occurs when the new and material evidence includes service department records. 38 C.F.R. § 3.156 (c); *Vigil v. Peake*, 22 Vet. App. 63 (2008). Specifically, at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim. 38 C.F.R. § 3.156 (c)(1).

Service department records include (i) service records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the Veteran by name; (ii) additional service records forwarded by the Department of Defense or the service department to VA any time after VA's original request for service records; and (iii) declassified records that could not have been obtained because the records were classified when VA decided the claim. 38 C.F.R. § 3.156 (c)(1).

Service department records do not include records that VA could not have obtained when it decided the claim because the records did not exist when VA decided the claim, or because the claimant failed to provide sufficient information for VA to identify and obtain the records from the respective service department, the Joint Services Records Research Center (JSRRC), or from any other official source. 38 C.F.R. § 3.156 (c)(2).

An award made based "all or in part" on additional service department records is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later, or such other date as may be authorized by the provisions of this part applicable to the previously decided claim. 38 C.F.R. § 3.156 (c)(3).

Prior to March 24, 2015, any communication or action indicating an intent to apply for one or more benefits under the laws administered by VA, from a claimant, his or her duly authorized representative, a Member of Congress, or some person acting as next of friend of a claimant who is not sui juris may be considered an informal claim. Such informal claim must identify the benefit sought. 38 C.F.R. § 3.155 (a).

Effective on and after March 24, 2015, VA replaced the informal/formal claims process with a standardized and more formal process. *See* 38 C.F.R. § 3.155 (2015). As a result of the rulemaking, a complete claim on an application form is required for all types of claims. 38 C.F.R. § 3.155 (d).

Treatment records by themselves do not constitute 'informal claims' for service connection. *Sears v. Principi*, 16 Vet. App. 244 (2002). While VA should broadly interpret submissions from a veteran, it is not required to conjure up claims not specifically raised. *Brannon v. West*, 12 Vet. App. 32 (1998).

38 U.S.C. § 5110(b)(2) and 38 C.F.R. § 3.400 (o)(2) provide an exception to the general rule for increased rating claims by stating that the effective date of an increased rating shall be the earliest date it is factually ascertainable that an increase in disability had occurred, if application is received within one year from such date, otherwise, the effective date is the date of claim. *See Hazan v. Gober*, 10 Vet. App. 511 (1997); *Servello v. Derwinski*, 3 Vet. App. 196 (1992). Basically, 38 U.S.C. § 5110 (b)(2) and 38 C.F.R. § 3.400 (o)(2) are applicable only where an increase in disability precedes a claim for an increased disability rating. *Harper v. Brown*, 10 Vet. App. 125 (1997).

1. Entitlement to an effective date earlier than November 12, 2015 for the award of service connection for bilateral pes planus with bilateral plantar fasciitis and heel spurs.

The Veteran seeks an earlier effective date for the award of service connection for bilateral pes planus. He contends that his service medical records (SMRs) were not used to adjudicate his initial foot claim in a May 13, 1983 rating decision and seeks relief pursuant to 38 C.F.R. § 3.156 (c). *See e.g.*, Veteran's December 2015 Correspondence. In support of his position he notes that he received 2 separate FOIA responses from approximately 2 years apart containing his SMRs. However, the responsive records in each package were not identical. *Id.* While the Veteran acknowledges his right to plead a claim asserting clear and unmistakable evidence (CUE) under 38 C.F.R. § 3.105, he specifically states that he is not filing a CUE claim as part of his appeal. *Id.*

Procedurally, the Veteran filed an original claim for service connection on January 26, 1983. He asserted that he sustained injury to his feet during basic training at Fort Benning, Georgia. No post-service medical treatment was identified by the Veteran on his application. The Veteran's SMRs were requested in March 1983. *See e.g.*, March 1983 SHARE Point Screens and March 1983 MAP-D Development Letter. He was afforded a VA Examination in March 1983. However, a May 1983 rating decision denied the Veteran's bilateral foot claim finding that injuries to his feet were acute and transitory, because they were not diagnosed during his March 1983 VA examination. The March 1983 rating decision became final when the Veteran did not file a notice of disagreement (NOD) or submit new and material evidence within the applicable appeal period. *See* 38 C.F.R. § 20.302.

In November 1996, the Veteran filed an informal claim to reopen his bilateral foot claim, indicating that he received treatment for his feet at McGuire VA Medical Center (VAMC) in Richmond, Virginia. VA requested the records identified by the Veteran, but no treatment regarding his feet was found. In December 1996, VA notified the Veteran that new and material evidence relevant to his foot condition was required to reopen his claim. A February 1997 rating decision denied the Veteran's petition to reopen his bilateral foot claim, because no new or material evidence was received. The February 1997 rating decision became final. *See* 38 C.F.R. § 20.302.

In September 2003, VA received an informal claim from the Veteran seeking to reopen a claim for plantar fasciitis on the basis that he had continually treated for the condition since service. In October 2003 correspondence, VA requested evidence from the Veteran showing that his plantar fasciitis existed since military service. No documentation to support the Veteran's contention was received. The Veteran was afforded a VA Foot examination in December 2003 and diagnoses of bilateral achilles tendon rupture sustained in the military, bilateral plantar fasciitis and bilateral pes planus were assigned. However, a May 2004 rating decision denied the Veteran's claim on a finding of no nexus between his in-service foot injury and his current plantar fasciitis disability. The May 2004 became final. *See* 38 C.F.R. § 20.302.

In April 19, 2010, the Veteran submitted an informal claim to reopen a claim for plantar fasciitis. VA afforded that Veteran a VA examination in July 2010. The examiner diagnosed the Veteran's foot condition as bilateral plantar fasciitis with osteoarthritis of the first metatarsal joint and bilateral pes planus. The examiner opined that the Veteran's bilateral foot disability was less likely than not related to active duty because no SMR documented that the Veteran reported feet conditions while on active duty. A VA adjudicator determined that the July 2010 VA examination was insufficient because the examiner failed to properly review the Veteran's SMRs and explain the relevance if any of his foot complaints during active duty. An addendum medical opinion was requested but never completed. *See e.g.,* August 2010 VA Exam Worksheet. The Veteran's claim was denied in a September 2010 rating decision for lack of a nexus opinion, indicating that the Veteran had failed to attend a second scheduled examination for his foot condition. The Veteran was given full notice of his appeal rights.

A December 10, 2010 Report of General Information indicated that the Veteran called about the denial of the claim, stating that he had attended the foot examination. VA noted that the examination contract firm QTC had confused the dates for the Veteran's examinations. The RO responded in correspondence dated February 2011 indicating that a review of his file was completed, and the Veteran's bilateral foot claim was denied by a September 2010 rating decision. The Veteran did not respond to the February 2011 correspondence or appeal the September

2010 rating decision by submitting a written notice of disagreement. The September 2010 became final. *See* 38 C.F.R. § 20.302.

The Veteran filed a notice of intent to file a claim on November 12, 2015, submitted correspondence on December 2015 regarding has bilateral foot disability, and a fully developed claim to reopen his claim for bilateral plantar fasciitis was received by VA in April 2016. The Veteran's bilateral foot claim was granted in an April 2016 rating decision.

In light of the foregoing, the Board finds that entitlement to an effective date of January 26, 1983 (the original date of claim) for the award of service connection for bilateral pes planus with bilateral plantar fasciitis and heel spurs pursuant to 38 C.F.R. § 3.156 (c)(1) is not warranted. Significantly, the May 1983 rating decision specifically referenced the Veteran's SMRs regarding foot complaints of flat feet during active duty. However, the basis for the initial denial of the Veteran's foot claim was not the lack of an in–service incurrence, but rather the lack of a current documented disability at the time of decision. The subsequent rating decisions similarly referenced the Veteran's SMRs.

The Board has also carefully reviewed the evidence of record and has found no formal or informal communication prior to November 12, 2015 without subsequent adjudication expressing an intent to reopen his claim for service connection for a bilateral foot disability. Notably, the Veteran does not assert that he filed an earlier informal or formal claim to reopen a claim for service connection for a bilateral foot disability. The Board is bound by statutory authority in the determination of effective dates. Pursuant to 38 C.F.R. § 3.400, the effective date of an evaluation and award of compensation based on a claim reopened after final disallowance will be the date of receipt of the claim or the date entitlement arose, whichever is the later.

Accordingly, the Board finds that the claim of entitlement to an effective date prior to November 12, 2015, for the grant of service connection for bilateral pes planus with bilateral plantar fasciitis and heel spurs must be denied. In reaching this conclusion, the Board has considered the applicability of the benefit-of-the-doubt doctrine. However, as the preponderance of the evidence is against the Veteran's

claim of entitlement to an earlier effective date, that doctrine is not applicable. 38 U.S.C. § 5107 (b); 38 C.F.R. § 3.102.

2. Entitlement to an effective date earlier than November 12, 2015 for the assignment of a 70 percent rating for service - connected posttraumatic stress disorder with persistent depressive disorder (PTSD) (also claimed as mood, emotion, and sleep disturbance).

The Veteran contends that the symptoms of his service-connected PTSD were severe enough to warrant a 70 percent rating prior to November 12, 2015. *See e.g.*, Veteran's PTSD Request for Rating Increase, December 2015. He seeks an effective date of November 12, 2014. *See* August 2016 Notice of Disagreement.

The Veteran has been service-connected for PTSD since September 2003, at which time the disability was assigned an initial rating of 30 percent. In May 2004, the Veteran received a notification letter that stated the RO granted the Veteran's PTSD claim in a May 2004 rating decision and assigned a 30 percent rating effective September 2003. That decision was not challenged, and thus became final. *See* 38 U.S.C. § 7105; 38 C.F.R. §§ 20.200, 20.201, 20.202.

On November 12, 2015, the Veteran submitted a notice of intent to file a claim for an increased evaluation for his PTSD which was accepted by VA on November 14, 2015. The Veteran filed a fully developed claim for an increased evaluation for his service – connected PTSD in April 2016.

The Veteran was afforded a VA examination on April 2016 to assess the severity of his PTSD. The Veteran reported that he had not had any mental health treatment even thought his primary care physician recommended it several times. He did not take any psychotropic medications for depression or anxiety. The Veteran stated he was separated from his wife and they were divorcing. He reported that during their marriage he would frequently yell at her and she was afraid of him because of his anger. The Veteran endorsed a good relationship with his two children. He was employed full time as an optician which enabled him to work independently.

The Veteran's symptoms on examination included depressed mood, anxiety, near continuous panic, suspiciousness, hypervigilance, suicidal ideation, mild memory

loss, chronic sleep impairment, and nightmares. The examiner noted that the Veteran reported symptoms of chronic depression which were as likely as not related to his PTSD. A diagnosis of persistent depressive disorder was assigned which was viewed as a progression of the Veteran's service – connected PTSD.

In an April 2016 decision, the RO granted a 70 percent rating effective November 12, 2015. The Veteran timely appealed seeking an effective date of November 12, 2014.

The Board notes that there is no competent evidence prior to the date of the claim (and the date of the April 2016 VA examination) showing that the Veteran's PTSD had increased in severity to the higher rating. Although the Veteran contended that his PTSD had worsened, the competent evidence of record shows otherwise. *See e.g.*, December 2015 Medical Treatment Record and Veteran's Statement.

In that regard, VA treatment records dated prior to the VA examination showed the Veteran had a VA mental health primary care consult by telephone on May 2015. His chief complaint was anxiety, PTSD symptoms and low mood. However, he denied suicidal or homicidal ideations as well as the need for crisis intervention,

In May 2013 the Veteran requested a one on one appointment with a VA mental health counselor to address recurrent crying spells due to PTSD. However, when a counselor reached out to him, the Veteran stated it was not a convenient time to talk and that he would call back. No return phone call was indicated.

Review of the records revealed no mental health treatment and no antidepressant medications prescribed in response to a psychiatric disability. While the Board sympathizes with the Veteran and recognizes that his PTSD is a significant disability, it is nevertheless bound to apply the regulations. Here, those regulations require a showing that prior to November 12, 2015, the Veteran experienced an increase in his PTSD symptoms such that a 70 percent rating would be warranted, under the applicable rating criteria. VA treatment records do not suggest that the assignment of a 70 percent rating would be warranted prior to November 12, 2015.

The preponderance of the evidence therefore does not show an increase in the severity of the Veteran's PTSD within one year before his November 12, 2015

intent to file a claim. Rather, the first objective indication of an increase in severity of his PTSD symptoms was in April 2016 when he underwent a VA examination. Therefore, the claim for an earlier effective date for the 70 percent rating for PTSD must be denied. 38 U.S.C. § 5110 (b)(2); 38 C.F.R. § 3.400 (o)(2).

Jennifer White
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board J. Alexander

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-help12. 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 aboutyour 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 isthe 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 statingwhat 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.

Mailto:
Board of Veterans' Appeals
PO Box 27063
Washington, DC 20038

Or, fax:
1-844-678-8979