

IN THE UNITED STATES COURT OF APPEALS FOR
VETERANS CLAIMS

JOE E. MORGAN

APPELLANT

V.

APPEAL NO. 15-1306

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS

APPELLEE

**APPELLANT'S PRO SE APPLICATION PURSUANT TO 28 U.S.C.A. § 2412
FOR RECOVERY OF COST INCURRED ON APPEAL**

Appellant Joe E. Morgan request an order of the Court approving the recovery of cost incurred in the litigating of his appeal of an adverse decision of the Board of Veterans Appeals (BVA) issued on February 18, 2015.

This Court issue a Memorandum Decision on August 24, 2016 remanding the appellant's appeal of the BVA decision for further development and readjudication. Appellant submits that said remand qualifies him for an award of cost and expenses as the prevailing party in the above styled appeal.

To be eligible for an Equal Access To Justice Act (EAJA) award, the applicant must file the application within the 30 day period set forth in 28 U.S.C.A. § 2412(d)(1)(B), and the application must include (1) A showing that the applicant is a prevailing party; (2) a showing that he is a party eligible for an award of EAJA because his net worth does not exceed \$2,000,000.00; (3) An allegation that the Secretary's position was not substantially justified; and (4) an itemized statement of the fees (or in this case, cost) sought. See 28 U.S.C.A. § 2412(d); Sumner v. Principi, 15 Vet.App. 256, 260 (2001) (en banc), aff'd sub.nom. Vaughn v.

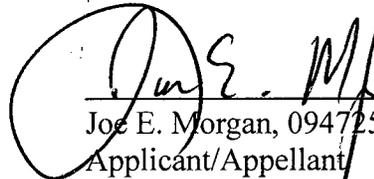
Principi, 333 F.3d 1351 (Fed.Cir. 2003), cert. denied, 541 U.S. 987, 124 S.Ct. 2014, 158 L.Ed. 2d 490 (2004).

In support of the foregoing, appellant submits that the present application is filed within the 30-day time limitations, that this Court's August 24, 2016 memorandum decision remanding all issues on his appeal on the merits make him a prevailing party, see *Kelly v. Nicholson*, 463 F.3d 1349, 1353 (Fed.Cir. 2006); See Memo. Dec. attached hereto; that he proceeded in said appeal of *Morgan v. McDonald*, (No. 15-1306, mem. dec. 2016), as indigent and without cost, the appeal was decided on the merits against the Secretary, and that he has attached an itemized statement of cost incurred for copying a compact disc from digital format to paper format for the purpose of briefing and as supported by the facts stated in the affidavit from state prison officials. See Affidavit of April Sides attached hereto.

The applicant was provided by the Secretary with a digitally formatted Amended Record Before the Agency approved by May 23, 2016 order of the court, and his being incarcerated, prevented his use of the Amended Record Before the Agency without his having to first have the disc copied to paper format. He states this was necessary due to his need to newly marshal the facts and pagination format in the amended record, where he could file an amended brief or his reply brief, if need be.

This being the case, Applicant/Appellant Joe E. Morgan incurred cost in the course of litigating his appeal in which he was declared indigent by this Court, paying the amount of \$48.75, as an active lien against his inmate account through no fault of his own. See Applicant's Exhibits 1-3, attached hereto.

WHEREFORE, Applicant/Appellant Joe E. Morgan moves this Honorable Court for approval of his Application for Cost incurred in the amount of \$48.75 pursuant to EAJA, and moves that his pleading be read liberally as to do justice for the reason cited herein.

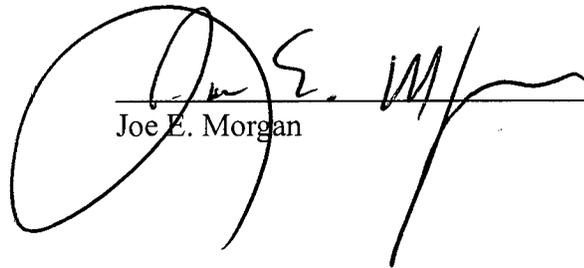


Joe E. Morgan, 094725
Applicant/Appellant
P.O. Box 500
Grady, Arkansas 71644

AFFIDAVIT

I, Joe E. Morgan declare under penalty of perjury (18 U.S.C. § 1621) that the foregoing is true and correct to the best of my knowledge and belief.

I have mailed a copy of the foregoing pleading to the V.A. Counsel of this 10th day of September, 2016.



Joe E. Morgan

Copy Mailed to:
Jonathan G. Scruggs
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(202) 632-6990

Sean Kendall, Esq.
P.O. Box N
Boulder, CO 80306-1876

STATE OF ARKANSAS)
COUNTY OF LINCOLN) SS

AFFIDAVIT

I, April Sides, Program Specialist, Cummins Unit, depose and state that: On or about June 2, 2016 I received one copy of a compact disc from the ADC Cummins Mail Room mailed from Department of Veterans Affairs, Washington, DC, addressed to Joe Morgan, ADC #94725 bearing a Court Case No. 15-1306. After reviewing the contents of the disc with the consent of Inmate Morgan, the disc contained the V.A. files for the active case on appeal but ADC policy prohibits inmates access to the disc, thus requiring inmate Morgan to have to take out a lien against his inmate trust account of \$48.75 to have this record printed for a total of 975 pages, being that he was determined to be indigent.

I further swear that the statements, matters and things contained herein are true and accurate to the best of my knowledge, information and belief.

I declare under penalty of perjury (18 U.S.C. § 1621) that the foregoing is true and correct.

Executed this ____ day of _____, 2016.


AFFIANT _____ 7/25/2016

Applicant's Exhibits
1-3

Arkansas Department of Correction
Inmate Trust Fund Account
Personal Withdrawal Request

RECEIVED
CUMMINS UNIT
JUN 02 2013
PROGRAM
COORDINATOR

Commin
ADC Unit

Joe E. Morgan 094725 1
Print Inmate Name ADC Number Barracks Number

All Information Requested On This Form Is To Be Printed
Postage Expense Will Be Charged By Trust Fund Centralized Banking For Each Request

Date of Request 6/2/16 Amount of Request \$ 48.75
Forty-eight and 75/100 Dollars

Check is to be Payable To: Cummins

Check is to be Mailed To: _____ Name

Street or P.O. Box

City, State, Zip

Purpose of Withdrawal Request Copy of VA Legal
Court Record Case No. 15-1306 CAVC

[Signature]
Inmate Signature

[Signature]
ADC Witnessed Signature

Approved: Circle One YES _____
NO _____

Signature Warden/Warden Designee

Business Manager-Print Name

Business Manager Signature

Trust Fund Centralized Banking: Inmate Funds Available-Circle One: Yes No

Applicant's Exhibit 2

Name: Morgan, Joe

ADC #: 094725B PID #: 0012970

COPS010B

Offender / Payee Account

Wednesday August 03, 2016 12:07:03 PM

Account

Commitment Prefix*: AB	Account Sequence #: 003
Account Type*: Legal Copies	
Account Status*: Open	As of*: 06/16/2016
	Status History
Court: 6th Cir Ct(Pulaski,Perry)	Docket #:
Court Date:	Established Date*: 06/16/2016
Distribution Priority*: 11th	Collection Rule*: Collected by Department
Original Obligation Amt.: \$ 48.75	Intercept Rule*: Bank Account Deposits Only
Total Ordered: \$ 48.75	Intercept %: 0.00
Paid: \$ 0.00	
Balance: \$ 48.75	

Payee Money Owed To

Party ID: 1609261	Name: AR Department of Corrections
Payee Type: ADC Centralized Trust Fund	Status: Active
Reference #:	Case Number:
Court of Jurisdiction:	Attention:
Address: 2403 E Harding Avenue Pine Bluff, Arkansas 71601 Jefferson County	

Comments

Legal Copies

Account Transactions (1 - 1 of 1)

Date	Type	Status	Amount	Balance	Task #	Receipt #	Disb #
06/16/2016	Original Obligation	Applied	\$ 48.75	\$ 48.75	09145645	N/A	

Prior Page

Print this screen

Show "Last Updated By" Information

Applicant's Exhibit 3

SCAN INTO EOMIS UPON COMPLETION

F-401

STATE OF ARKANSAS - DEPARTMENT OF CORRECTION

CONFISCATED FORM - AREA OR PERSON

(Check One) Inmate _____ Visitor _____ Staff _____ Area _____

Unit: Cummins Building or Area: _____ Barracks 1 Cell _____

Date and Time of Search: 8/6/16 3:30 pm:am

Officer(s) Conducting Search: (Print) April Y. Sides

Officer(s) Conducting Search: (Signature) _____

Inmate Name: J. Morgan ADC #: 94725

Articles Seized (description and number of items):

Number	Description
<u>2</u>	<u>DISK MAILERS</u>

Reason Seized: _____ Voluntarily Produced Excess Property _____ Contraband _____ Disciplinary/Criminal Evidence _____

Other Legal Material Marked on CD

Inmate Signature: [Signature] 94725 8/29/16 () Refused to Sign

Area/Shift/Supervisor: (Signature) [Signature]

Disposition of Contraband: Inmate Property

Copy Delivered to Inmate: Date: 8-29-16 Time: 1:30 pm

Delivered By: (Signature) [Signature]

Disciplinary Written: No () Yes By: _____

RECEIVED
CUMMINS UNIT

AUG 29 REC'D

Voluntarily Produced Excess articles only may be mailed to: _____

PERSONNEL
PROPERTY MANAGER

Inmate authorizes deduction of postage from pen store account for voluntarily produced excess property only:
() No () Yes Inmate Signature: _____

To be completed by UPCO

Destruction Date: ____/____/____

UPCO: (Signature) _____ Witnessing Staff: (Signature) _____

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-1306

JOE E. MORGAN, APPELLANT,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENBERG, *Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

GREENBERG, *Judge*: The appellant, Joe E. Morgan, appeals pro se a February 18, 2015, Board of Veterans' Appeals (Board) decision that (1) denied entitlement to benefits based on service connection for post-traumatic stress disorder (PTSD) and (2) found that the appellant failed to timely appeal the matter of a compensable rating for a service-connected corneal scar of the left eye with retained foreign body to include light sensitivity.¹ Record (R.) at 2-16. In an informal brief, the appellant argues that the Board (1) failed to support its decision with reliable medical evidence; (2) failed to consider third party lay statements; (3) made improper findings regarding the appellant's credibility; (4) erred in failing to order a VA mental health examination; and (5) failed to properly consider a reasonably raised claim of pain from photo-phobia light sensitivity. Appellant's Brief at 1-7. The Court will construe the appellant's informal brief as a general contention of error concerning the Board's decision. *See Calma v. Brown*, 9 Vet.App. 11, 15 (1996) (it is the Court's

¹ Additionally, the Board remanded to the agency of original jurisdiction (AOJ) the appellant's claims for benefits based on service connection for a psychiatric disorder other than PTSD, to include depression and anxiety. These matters are not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997). The Secretary concedes that the Board erred in finding that the appellant had not timely appealed the matter of a compensable rating for a service-connected corneal scar of the left eye with retained foreign body to include light sensitivity. *See Appellee's Brief* at 11-12.

practice to liberally construe the pleadings of pro se appellants). For the following reasons, the Court will reverse the Board's finding that the appellant failed to timely appeal the matter of a compensable rating for a service-connected corneal scar of the left eye, vacate the remainder of that part of the Board's February 18, 2015, decision on appeal, and remand all matters on appeal for further development and readjudication.

Justice Alito noted in *Henderson v. Shinseki* that our Court's scope of review in this appeal is "similar to that of an Article III court reviewing agency action under the Administrative Procedure Act, 5 U.S.C. § 706." 562 U.S. 428, 432 n.2 (2011); see 38 U.S.C. § 7261. The creation of a special court solely for veterans, and specified relations of veterans, is consistent with congressional intent as old as the Republic. See *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436 (1792) ("[T]he objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress."). "The Court may hear cases by judges sitting alone or in panels, as determined pursuant to procedures established by the Court." 38 U.S.C. § 7254. Accordingly, the statutory command of Congress that a single judge may issue a binding decision, pursuant to procedures established by the Court, is "unambiguous, unequivocal, and unlimited." *Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993); see generally *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The appellant served on active duty in the U.S. Army from August 1976 to May 1983, primarily as a wire system and telephone installer. R. at 388-89 (DD Form 214). In June 1981, the appellant was shot in the face with a blank round at close range during a training exercise by a service member who, according to Army investigators, mistakenly believed his rifle was equipped with a blank adapter that would have prevented any discharge after firing. R. at 310-42, 670-72. The appellant sought treatment for "[s]uperficial facial powder burns . . . secondary to blank explosion," and surgery was performed to remove "conjunctival and intracorneal" foreign bodies from both eyes. R. at 344. In January 1983, the appellant was deemed "not qualified for reenlistment" as a result of light sensitivity from a corneal scar in his left eye. R. at 689.

In July 1983, the appellant filed a claim for benefits based on service connection for a corneal scar in his left eye. R. at 803-06. In a January 1985 rating decision, the regional office (RO) granted the appellant service connection for a corneal scar and retained foreign body in his left eye, with a noncompensable rating. R. at 742-45. The appellant did not appeal and the decision became final.

In August 2002, the appellant filed a claim for benefits based on service connection for PTSD. R. at 699-04. In October 2002, the appellant submitted a statement in support of his PTSD claim with an attached PTSD questionnaire, stating that he has experienced "episodes of flashbacks" since service and suffers from panic attacks, depression, nervousness, "fits of anger," violent episodes, and "sleepless nights due to dreams of family members being shot and found dead in the woods." R. at 668-72. In November 2002, a court-appointed psychologist was asked to determine the appellant's fitness to stand trial and diagnosed the appellant with depression, anxiety, personality disorder not otherwise specified, and paraphilia.² R. at 592. At the time, he was incarcerated awaiting trial on charges stemming from the sexual abuse of his 13-year-old stepdaughter, after having been convicted in 1990 or 1991 for a similar offense involving the victim's older sister.³ R. at 545, 556. He initially attributed this conduct to a need to discipline the girls, but later blamed it on "demons" in his head. R. at 558. In a December 2002 rating decision, the RO denied the appellant's claim. R. at 674-78.

In May 2003, while still incarcerated, the appellant was treated at the Arkansas State Hospital, citing psychiatric symptoms such as auditory hallucinations, crying spells, and depression. R. at 554-59. In June 2003, the treating psychiatrist opined that the symptoms reported by the appellant and the manner of reporting is "characteristic of individuals who are feigning a mental disorder, and is rarely seen in clients responding truthfully," and for that reason the appellant was fit to stand trial. R. at 569. In July 2003, the same psychiatrist opined that the appellant was fit to stand trial and ordered him discharged from the state hospital and returned to the custody of the sheriff with a diagnosis of depressive disorder not otherwise specified and malingering. R. at 545-53. The psychiatrist also discussed the appellant's service history, in particular the incident where the appellant "was shot in the face with a blank round," and noted that the appellant "stated that he left the service because he did not feel that the incident was handled correctly by his superiors." R.

² "Paraphilia" is "a psychosexual disorder characterized by recurrent intense sexual urges, by sexually arousing fantasies, or by behavior involving use of a nonhuman object, the suffering or humiliation of oneself or one's partner, or children or other nonconsenting partners." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1380 (32d ed. 2012) (hereinafter DORLAND'S).

³ An Arkansas State inmate records search indicates that a "Joe E. Morgan" was convicted of "Sexual Assault 1st Degree" and sentenced in August 2003 to a 60 year term as a habitual offender. See http://adc.arkansas.gov/inmate_info/search.php (last visited August 2, 2016).

at 547.

In a May 2003 rating decision, the RO denied the appellant's claim for benefits based on service connection for PTSD. R. at 644-50. In May 2004, the appellant submitted a formal disagreement. R. at 641-43. In April 2005, the appellant sent the RO a letter acknowledging receipt of the continued denial of his PTSD claim and describing further his symptoms of flashbacks, outbursts of anger and violence, and crying spells. R. at 580-85.

In a September 2010 rating decision, the RO reopened the appellant's claim for service connection for a corneal scar and retained foreign body to the left eye, but continued his non-compensable disability rating. R. at 452-58. That same month, the appellant submitted a formal disagreement with the RO decision. R. at 444-49.

In June 2011, the appellant submitted a statement in support of his PTSD claim, contending that since his discharge from service he has suffered from "feeling[s] of apprehension and anxiety," "unresolved anger and frustration," nightmares, uncontrollable public crying, and an inability to communicate with his spouse. R. at 292-94. The appellant also attached statements from his wife, a friend, and his sister, each of whom confirmed his reported symptoms. R. at 295-99.

In September 2011, the appellant submitted a Substantive Appeal to the Board of the noncompensable rating for a corneal scar and retained foreign body to the left eye with light sensitivity. R. at 234-39. In November 2011, the RO issued a Statement of the Case (SOC) continuing its noncompensable rating for the appellant's left eye condition. R. at 221-33. In December 2011, the RO received a copy of the appellant's September 2011 Substantive Appeal. R. at 203-07. In June 2012, the appellant's representative submitted evidence of continued symptoms and treatment for his left eye while in prison. R. at 178-87.

In September 2012, the Board denied the appellant's claim for benefits based on service connection for PTSD, finding that there "is no competent evidence" that the appellant has a diagnosis of the condition. R. at 117-31. In July 2014, the parties entered into a joint motion for partial remand (JMPR) vacating the September 2012 Board decision and remanding the claim "for the Board to provide an adequate statement of reasons or bases for a determination as to whether Appellant is entitled to a VA examination." R. at 433-39.

In February 2015, the Board issued the decision on appeal. R. at 2-16. With regard to the

appellant's claim for a compensable rating for a service-connected left eye condition, the Board found that the appellant failed to file a timely Substantive Appeal of this claim and thus "this issue is not before the Board for appellate consideration." R. at 5. With regard to the appellant's PTSD claim, the Board found that the appellant is not entitled to benefits based on service connection as he "is not reporting a contemporaneous medical diagnosis of PTSD, and all of his symptoms have already been attributed to diagnoses other than PTSD by mental health professionals," specifically the November 2002, May 2003, June 2003, and July 2003 psychological examinations of the appellant's fitness to stand trial. R. at 11-12. The Board also found that, because the appellant cannot offer competent evidence beyond his own lay diagnosis that his symptoms are attributable to PTSD, as opposed to the other psychiatric conditions for which he was diagnosed, the appellant was not entitled to a VA examination. R. at 14. The Board pointed to the "indications of 'malinger' in the medical records" as evidence that any examination ordered would have little probative value as it "is unclear that the Veteran would provide meaningful statements to any examiner." R. at 10. This appeal follows.

The Court determines, and the Secretary agrees, that the Board clearly erred in finding that the appellant had not perfected his appeal with respect to his claim for a compensable rating for his service-connected left eye condition. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990) (holding that the Board's findings of fact are reviewed under the "clearly erroneous" standard of review); Appellee's Brief at 11-12. The record shows that in September 2011 the appellant submitted a Substantive Appeal to the Board of the noncompensable rating for the left eye. R. at 234-39. In December 2011, the RO received a second copy of the appellant's Substantive Appeal, in response to its issuance of the November 2011 SOC. R. at 203-07, 221-33. The record reflects that the appellant timely appealed his claim for a compensable rating for his left eye condition. Remand is required for the Board to adjudicate this claim.

With respect to the appellant's PTSD claim, the Court determines that the Board provided an inadequate statement of its reasons or bases for determining that the appellant is not entitled to service connection because his symptoms are attributable to diagnoses other than PTSD. *See* 38 U.S.C. § 7104(d)(1) ("Each decision of the Board shall include . . . a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on

all material issues of fact and law presented in the record."); *Gilbert*, 1 Vet.App. at 56-57 (finding that Congress mandated, by statute, that the Board provide a written statement of reasons or bases for its conclusions that is adequate to enable the appellant to understand the precise basis for the Board's decision and to facilitate review in this Court).

The Board based its finding that the appellant's symptoms were attributable to a condition other than PTSD on the November 2002, May 2003, June 2003, and July 2003 private psychological examinations, in which the appellant was diagnosed with depressive disorder, anxiety disorder, malingering, and mood disorder. R. at 10-11. However, those examiners considered only whether the appellant was mentally fit to stand trial and were neither asked to consider nor thought to consider whether the appellant's symptoms were indicative of PTSD. R. at 545-53, 554-59, 565-71, 592-93. The Board's finding that the appellant's symptoms are not attributable to PTSD is in error, as it was not based on the opinion of any medical examiner, but rather on the Board's own unsubstantiated medical judgment that, because the appellant was diagnosed with other psychological conditions, his symptoms are not indicative of PTSD. *See Colvin v. Derwinski*, 1 Vet.App. 171, 174 (1991) (holding that the Board cannot rely on its own medical judgment). Remand is required for the Board to provide an adequate statement of its reasons or bases for its finding that the appellant's symptoms did not amount to PTSD. Any medical finding made by the Board should be supported by objective medical evidence, which may include a medical examination that actually addresses whether the appellant's symptoms are, or at any point in the claims period were, indicative of PTSD. *Id.*

Because the Court is remanding the matter, it will not address the appellant's remaining arguments. *See Dunn v. West*, 11 Vet.App. 462, 467 (1998). On remand, the appellant may present, and the Board must consider, any additional evidence and arguments. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). This matter is to be provided expeditious treatment on remand. *See* 38 U.S.C. § 7112; *see also Hayburn's Case*, 2 U.S. (2 Dall.) at 410, n. ("[M]any unfortunate and meritorious [veterans], whom Congress have justly thought proper objects of immediate relief, may suffer great distress, even by a short delay, and may be utterly ruined, by a long one.")

For the foregoing reasons, the Court will REVERSE the Board's finding that the appellant failed to timely appeal the matter of a compensable rating for a service-connected corneal scar of the

left eye with retained foreign body to include light sensitivity, VACATE the remainder of the Board's February 18, 2015, decision on appeal and REMAND all matters on appeal for readjudication.

DATED: August 24, 2016.

Copies to:

Joe E. Morgan

VA General Counsel (027)

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Keegay
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