

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

FELIX PAUL PHILLIPS,)
Appellant,)

vs.)

Vet. App. No. 22-2575

DENIS MCDONOUGH,)
Secretary of Veterans Affairs,)
Appellee.)

APPELLANT’S NOTICE PURSUANT TO *SOLZE V. SHINSEKI*

In accordance with the “duty to notify the Court of developments that could deprive the Court of jurisdiction or otherwise affect its decision,” *Solze v. Shinseki*, 26 Vet.App. 299, 301 (2013), counsel for Appellant advises the Court of the following development.

On December 28, 2023, VA issued a higher level review decision dated December 26, 2023, granting an effective date of November 25, 2009 for the award of TDIU. Exhibit A.

Wherefore, the Appellant notifies the Court of the foregoing development.

Respectfully submitted,

/s/ Amy F. Odom

Amy F. Odom

Chisholm Chisholm & Kilpatrick Ltd

321 S Main St #200

Providence, RI 02903

(401) 331-6300

(401) 421-3185

Counsel for Appellant

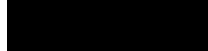
EXHIBIT A



**DEPARTMENT OF VETERANS AFFAIRS
Decision Review Operations Center (DROC)
St. Petersburg Regional Office**

FELIX PHILLIPS

VA File Number



**Represented By:
VIRGINIA A GIRARD-BRADY
Rating Decision
12/26/2023**

INTRODUCTION

You have requested VA provide a higher-level review of the issue(s) addressed in this decision.

Our records reflect that you are a Veteran of the Vietnam Era. You served in the Army from July 11, 1966 to July 12, 1968. We received your request for a Higher Level Review on August 22, 2023. Based on a review of the evidence listed below, we have made the following decision(s) on your claim.

Please note: The evidentiary record is closed as of the date of notice of our prior decision. VA received additional evidence after the record closed that was not considered as part of this decision. If you would like VA to consider this evidence, you may submit a supplemental claim at any time; however, VA must receive your application within one year of the date of notice of this decision to preserve your right to receive the maximum possible benefit.

DECISION

1. Entitlement to an earlier effective date for the grant of individual unemployability is granted, with a new effective date of November 25, 2009.



FELIX PHILLIPS

2 of 7

2. Entitlement to an earlier effective date for the grant of eligibility for Dependents' Educational Assistance under 38 USC chapter 35 is granted, with a new effective date of November 25, 2009.
3. Evaluation of onychomycosis with dyshidrotic eczema, acne vulgaris, epidermal cysts, carbuncles and tinea pedis, which is currently 60 percent disabling, is continued.

EVIDENCE

- VA Form 21-4138, Statement in Support of Claim, received on August 28, 2002.
- Service treatment and personnel records for the period of July 11, 1966 through July 12, 1968.
- Rating Decision dated August 1, 2003, and our letter to you dated August 4, 2003.
- Letter received from you on September 17, 2003 (Notice of Disagreement).
- Statement of the Case (SOC), issued on November 30, 2004.
- Photographs of your hands, received on December 16, 2004 and January 21, 2010.
- VA Form 9, Appeal to Board of Veterans' Appeals, received on January 5, 2005.
- Examination, dated February 17, 2005, from Dr. Robert Soule.
- Rating Decision dated March 1, 2010, and our letter to you dated March 4, 2010.
- Letter from you, dated July 10, 2010 (Notice of Disagreement).
- Supplemental Statement of the Case (SSOC), issued to you on January 21, 2011.
- SOC issued to you on January 21, 2011.
- Board of Veterans' Appeals (BVA) travel board hearing, dated May 3, 2011.
- VA skin diseases examination, dated September 28, 2012, VAMC Houston.
- SSOC issued to you on November 9, 2012.
- BVA decision, dated March 15, 2013.
- Rating Decision dated April 18, 2023, and our letter to you dated April 18, 2013.
- Notice of Disagreement, received on August 5, 2013.
- In the United States Court of Appeals for Veterans Claims, Joint Motion for Remand, dated January 31, 2014.
- BVA remand decision, dated April 23, 2014.
- VA skin diseases examination, dated July 11, 2016, VAMC Houston.
- SSOC issued to you on July 30, 2016.
- SSOC issued to you on August 30, 2016.
- VA medical opinion, dated November 2, 2017.
- BVA decision, dated April 17, 2018.
- Rating Decision dated May 18, 2018, and our letter to you dated August 8, 2018.
- Initial posttraumatic stress disorder examination, dated June 4, 2018, VAMC Houston.
- VA Form 21-0958, Notice of Disagreement, received on September 28, 2018.
- VA Form 21-4138, Statement in Support of Claim, received on September 28, 2018.
- SOC issued to you on May 20, 2019.
- VA Form 20-0996, Decision Review Request: Higher-Level Review, received on June 7, 2019.
- Higher-Level Review informal conference, held on July 15, 2019.
- Rating Decision dated July 25, 2019.
- VA skin diseases contract examination, dated September 5, 2019.
- VA initial posttraumatic stress disorder contract examination, dated September 5, 2019.



FELIX PHILLIPS

[REDACTED]

3 of 7

- SOC issued to you on November 27, 2019.
- VA Form 20-0996, Decision Review Request: Higher-Level Review, received on December 16, 2019.
- Higher-Level Review informal conference, held on April 7, 2020.
- Rating Decision dated April 8, 2020, and our letter to you dated April 10, 2020.
- VA Form 10182, Decision Review Request: Board Appeal (Notice of Disagreement), received on May 7, 2020.
- Rating Decision dated May 12, 2020, and our letter to you dated May 26, 2020.
- VA Form 10182, Decision Review Request: Board Appeal (Notice of Disagreement), received on August 11, 2020.
- BVA remand decision, dated October 13, 2020.
- VA contract examination medical opinion, dated October 21, 2020.
- Rating Decision dated November 5, 2020, and our letter to you dated November 6, 2020.
- VA Form 20-0996, Decision Review Request: Higher-Level Review, received on December 7, 2020.
- BVA remand decision, dated January 28, 2021.
- VA Form 21-8940, Veteran's Application for Increased Compensation Based on Unemployability, received on April 7, 2021.
- VA skin diseases contract examination, dated April 13, 2021.
- VA contract examination medical opinions, dated April 13, 2021.
- Rating Decision dated October 25, 2021, and our letter to you dated October 26, 2021.
- VA Form 20-0996, Decision Review Request: Higher-Level Review, received on November 4, 2021.
- Rating Decision dated December 7, 2021, and our letter to you dated December 10, 2021.
- VA skin diseases contract examination, dated December 22, 2021.
- VA review posttraumatic stress disorder contract examination, dated December 23, 2021.
- VA skin diseases contract examination, dated December 30, 2021, with medical opinions.
- Statement from you, dated December 26, 2021.
- VA Form 10182, Decision Review Request: Board Appeal (Notice of Disagreement), received on January 31, 2022.
- Rating Decision dated March 3, 2022, and our letter to you dated March 8, 2022.
- Rating Decision dated April 5, 2022, and our letter to you dated April 19, 2022.
- Rating Decision dated May 26, 2022, and our letter to you dated May 31, 2022.
- VA Form 20-0996, Decision Review Request: Higher-Level Review, received on June 8, 2022.
- Rating Decision dated July 27, 2022, and our letter to you dated August 1, 2022.
- VA skin diseases contract examination, dated April 12, 2023, with medical opinions.
- Rating Decision dated May 30, 2023, and our letter to you dated May 31, 2023.
- VA Form 10182, Decision Review Request: Board Appeal (Notice of Disagreement), received on June 13, 2023.
- Board of Veterans' Appeals (BVA) decision, dated July 25, 2023.
- Outpatient treatment reports from VAMC Houston for the period of October 27, 2006 through August 3, 2023.
- Rating Decision dated August 15, 2023, and our letter to you dated August 21, 2023.
- VA Form 20-0996, Decision Review Request: Higher-Level Review, received on August 22, 2023 with cover-letter from your attorney.
- Higher-Level Review informal conference, held on December 21, 2023.



FELIX PHILLIPS

4 of 7

REASONS FOR DECISION

1. Entitlement to an earlier effective date for the grant of individual unemployability.

As a general rule, the effective date of an evaluation and award of pension, compensation or dependency and indemnity compensation based on an original claim, a claim reopened after final disallowance, or a claim for increase will be the date of receipt of the claim or the date entitlement arose, whichever is the later. (38 CFR 3.400, 38 CFR 3.155)

Total disability ratings for compensation based on individual unemployability may be assigned where the schedular rating is less than total if it is found that the disabled person is unable to secure or follow a substantially gainful occupation as a result of 1) a single service-connected disability ratable at 60 percent or more, or 2) as a result of two or more disabilities, provided at least one disability is ratable at 40 percent or more, and there is sufficient additional service-connected disability to bring the combined rating to 70 percent or more. For the purposes of one 60 percent disability, or one 40 percent disability in combination, the following will be considered as one disability: disabilities of one or both upper extremities; or of one or both lower extremities, including the bilateral factor, if applicable; disabilities resulting from common etiology or a single accident; disabilities affecting a single body system (e.g. orthopedic, digestive, respiratory, cardiovascular-renal, neuropsychiatric); multiple injuries incurred in action; or multiple disabilities incurred as a prisoner of war. Prior employment or unemployment status is immaterial if your disabilities render you unemployable. (38 CFR 3.340, 38 CFR 3.341, 38 CFR 3.343, 38 CFR 4.16)

The Board of Veterans' Appeals (BVA), in their decision of April 1, 2022, determined that you were unemployable from April 7, 2020 due to your service-connected skin conditions and your posttraumatic stress disorder. With the granting of a 60 percent evaluation for your service-connected skin conditions from August 28, 2002, in our decision of August 15, 2023, you met the schedular requirements for individual unemployability from August 28, 2002. Therefore, we have considered entitlement to an earlier effective date for individual unemployability within the scope of your claim for a higher evaluation for your service-connected skin conditions.

VA skin diseases examination, dated September 28, 2012, indicates that your skin conditions do not impact your ability to work.

VA skin diseases examination, dated July 11, 2016, indicates that your skin conditions do not impact your ability to work.

VA skin diseases contract examination, dated September 5, 2019, indicates that your skin conditions do not impact your ability to work.

VA skin diseases contract examination, dated April 13, 2021, indicates that your skin conditions do not impact your ability to work.

VA skin diseases contract examination, dated December 22, 2021, indicates that your skin



FELIX PHILLIPS

5 of 7

conditions do not impact your ability to work.

VA skin diseases contract examination, dated December 30, 2021, indicates that your skin conditions do not impact your ability to work.

VA skin diseases contract examination, dated April 12, 2023, indicates that your skin conditions do impact your ability to work because of itchy skin affecting concentration on activities tasks.

We previously determined that you met the criteria for a 70 percent evaluation for your posttraumatic stress disorder from November 25, 2009 based on having occupational and social impairment, with deficiencies in most areas, such as work, school, family relations, judgment, thinking, or mood.

On VA Form 21-8940 received April 7, 2021, you reported that you last worked on February 26, 1978. You identified your posttraumatic stress disorder and your skin conditions as being the service-connected disabilities which prevented you from securing or following any substantially gainful occupation. The Board of Veterans' Appeals reached this same conclusion. The evidence does not demonstrate that you were unemployable due solely to your service-connected skin conditions. Rather, you were found to be unemployable due to combined effects of your your service-connected skin conditions and your posttraumatic stress disorder. We cannot therefore grant entitlement to individual unemployability prior to the date in which service connection was granted for posttraumatic stress disorder. We granted service connection for posttraumatic stress disorder from November 25, 2009, at 70 percent. Since you last worked in 1978, and your service-connected skin disabilities and your service-connected posttraumatic stress disorder are shown to have precluded you from securing or following any substantially gainful occupation, we have granted you entitlement to an earlier effective date for the granting of entitlement to individual unemployability.

Entitlement to an earlier effective date for the grant of individual unemployability is granted because with the assignment of a higher evaluation of 60 percent for your service-connected skin conditions from an earlier date, and with consideration of the combined effects of your service-connected skin conditions and your posttraumatic stress disorder, we have determined that an earlier effective date of November 25, 2009 is warranted for individual unemployability, the date in which service connection was granted for posttraumatic stress disorder, the disability that when combined with the effects of your service-connected skin conditions, renders you unemployable. (38 CFR 3.400, 38 CFR 4.16)

2. Entitlement to an earlier effective date for the grant of eligibility to Dependents' Educational Assistance under 38 U.S.C. chapter 35.

As a general rule, the effective date of an evaluation and award of pension, compensation or dependency and indemnity compensation based on an original claim, a claim reopened after final disallowance, or a claim for increase will be the date of receipt of the claim or the date entitlement arose, whichever is the later. (38 CFR 3.400, 38 CFR 3.155)



FELIX PHILLIPS

[REDACTED]
6 of 7

In a separate issue, we granted an earlier effective date of November 25, 2009 for the granting of a total evaluation based on individual unemployability. Evidence from that date sufficiently establishes permanency of your total evaluation.

Entitlement to an earlier effective date for the grant of eligibility to Dependents' Educational Assistance under 38 U.S.C. chapter 35 is granted because an earlier effective date of November 25, 2009 has been assigned for the granting of a total evaluation based on individual unemployability, and permanency of your total evaluation is sufficiently shown from that date. (38 CFR 3.400)

3. Evaluation of onychomycosis with dyshidrotic eczema, acne vulgaris, epidermal cysts, carbuncles and tinea pedis, currently evaluated as 60 percent disabling.

The rating schedule is primarily a guide in the evaluation of disability resulting from all types of diseases and injuries encountered as a result of or incident to military service. An increase in the evaluation assigned for a disability is warranted when the average impairment in earning capacity resulting from such diseases and injuries in civil occupations has increased and the disability picture meets the criteria required for a higher rating. (38 CFR 3.321, 38 CFR 4.1, 38 CFR 4.7)

Our decision of August 15, 2023 assigned a 60 percent evaluation for your service-connected skin conditions from August 28, 2002 under the old rating schedule criteria.

VA skin diseases contract examination, dated April 12, 2023, shows you take Clobetasol, a topical corticosteroid or other immunosuppressive medication, on a constant/near-constant basis for treatment for your skin conditions. Your skin conditions affect at least 5 percent but less than 20 percent for total body area and exposed areas. Your skin conditions do not cause scarring.

The findings of the most recent VA contract examination would only support a 10 percent evaluation. However, since we assigned a 60 percent evaluation for your skin conditions from August 28, 2002, that evaluation became protected on August 28, 2022. Therefore, the evaluation cannot be reduced unless there is a showing of fraud, and not such finding of fraud it shown in your case. (38 CFR 3.951, 38 CFR 4.1118)

The evaluation of onychomycosis with dyshidrotic eczema, acne vulgaris, epidermal cysts, carbuncles and tinea pedis, is continued as 60 percent disabling.

We have assigned a 60 percent evaluation for your onychomycosis with dyshidrotic eczema and acne vulgaris based on:

- More than 40 percent of the exposed areas affected

Additional symptom(s) include:

- Less than 5 percent of the entire body affected
- No more than topical therapy required during the past 12-month period



FELIX PHILLIPS



7 of 7

Higher evaluations may also be warranted based on:

- Disfigurement of the head, face, or neck
- Scars considered disabling due to limitation of function of the affected part; or,
- Painful or unstable scar(s) (38 CFR 4.118)

This is the highest schedular evaluation allowed under the law for dermatitis. (Historical 38 CFR 4.118 effective prior to August 13, 2018)

To establish entitlement to an extra-schedular evaluation for your onychomycosis with dyshidrotic eczema, acne vulgaris, epidermal cysts, carbuncles and tinea pedis, evidence must indicate your disability presents such an exceptional or unusual disability picture with such related factors as marked interference with employment or frequent period of hospitalization to render impractical the application of the regular rating schedule standards. After a review of the evidence of record, there is no indication that your disability presents such an exception or unusual disability picture as to render impractical the application of the regular rating schedule standards. As such, your case was not referred to the Director of Compensation Service for consideration of an extra-schedular evaluation. (38 CFR 3.321)

REFERENCES:

Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all Veteran benefits. For additional information regarding applicable laws and regulations, please consult your local library, or visit us at our website, www.va.gov.

