

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

No. 22-5377

JAMES W. RORIE, SR.,

Appellant

v.

DENIS MCDONOUGH,

Secretary of Veterans Affairs,

Appellee

SUPPLEMENTAL BRIEF OF APPELLANT

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January 19, 2024

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SUPPLEMENTAL BRIEF OF THE APPELLANT

COURT ORDER QUESTIONS

1. What authority requires the Court to look past the holding in *Pacheco* concerning § 3.157(b).
2. How does *Kisor* effect or undermine the holding in *Pacheco*. Is there genuine ambiguity in the regulation. Assuming genuine ambiguity how does *Kisor* require a different approach than the approach by the Court in *Pacheco*.
3. Assuming *Kisor* does not require deference of the agency's interpretation of § 3.157(b) and the Court revisits the regulation's interpretation, how would the regulation be applied on these facts in the absence of deference.

I. NATURE OF THE PROCEEDING

On November 20, 2023, this Court ordered Appellant, James W. Rorie, Sr., to provide a supplemental brief to address specific questions of the Court. This brief is in response to that Court order.

II. DISCUSSION OF THE COURT'S QUESTIONS

A. THE SUPREME COURT'S HOLDING IN *KISOR* REQUIRES THE COURT TO REEVALUATE THE INTERPRETATION OF 38 C.F.R. § 3.157(b)

This Court must follow Supreme Court precedent. See *Brewer v. West*, 11 Vet.App. 228, 233 (1998) (the Court's reasoning must be consistent with Supreme Court holdings) see also *Bethea v. Derwinski*, 2 Vet.App. 252, 254 (1992) ("decisions of the Court are bound by precedent, which includes . . . a decision of the Supreme Court of the United States"). The decision in *Pacheco* was issued in July 2014. See *Pacheco v. Gibson*, 27 Vet.App. 21 (2014). Nearly five years later, in June 2019, the Supreme Court issued *Kisor*. See *Kisor v. Wilkie*, 588 U.S. ___, 139 S.Ct. 2400 (2019).

This Court in *Pacheco* simply found that since both the Appellant's interpretation and the Secretary's interpretation of the regulation could serve as its meaning, the regulation was ambiguous. See *Pacheco*, 27 Vet.App. at 26. As a result, the Court then applied deference to the Agency's interpretation. See *id.* However, the Supreme Court in *Kisor* explained that a Court "should not afford *Auer* deference" until **after "exhausting all the 'traditional tools' of construction."** *Kisor*, 139 S.Ct. at 2405 (emphasis added).

The Supreme Court continued:

A Court must **carefully consider the text, structure, history, and purpose of a regulation before resorting to deference.**

Id. (emphasis added). The Supreme Court explained that a Court should not “waive the ambiguity flag just because it found the regulation impenetrable on first read.” *Id.* at 2415. The *Kisor* Court further explained that a court should consider:

[T]he text, structure, history, and purpose of a regulation, **in all the ways it would if it had no agency to fall back on. [cite]. Doing so will resolve many seeming ambiguities out of the box**, without resort to *Auer* deference.

Id. (emphasis added).

In *Pacheco* this Court failed to **exhaust** all the traditional tools of construction before resorting to deference to the Agency’s interpretation. Therefore, the Court’s rationale in *Pacheco* is not consistent with Supreme Court precedent.

The Supreme Court in *Kisor* also held that a court has further analysis to undertake before deferring to an Agency’s interpretation even when the regulation is genuinely ambiguous. The *Kisor* Court explained that this goes beyond a finding that the Agency’s interpretation is reasonable. See *id.* at 2415-2418. The Supreme Court explained that after finding a regulation is genuinely ambiguous, and the Agency’s interpretation is reasonable:

Still, we are not done – for not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference. We have recognized in applying *Auer* that **a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight.**

Id. at 2416 (emphasis added). The *Kisor* Court went on to explain that as a court conducts their independent inquiry it should consider “important markers for

identifying when *Auer* deference is and is not appropriate.” *Id.* These markers include determining whether the agency’s interpretation is its “official position,” whether it in “some way implicate[s] [the agency’s] substantive expertise,” and should not be “post hoc rationalization” or create “unfair surprise.” *Id.* at 2416-2418.

In *Pacheco*, this Court did not conduct an “independent inquiry” on whether the context and character of the Secretary’s interpretation entitles it to controlling weight before conferring deference. See *Kisor*, 139 S.Ct. at 2416. Instead, in *Pacheco* the Court found that since there were two possible interpretations, the Secretary’s interpretation “[would] be afforded deference so long as” or unless it is plainly erroneous, inconsistent with the regulation, and does not reflect the Agency’s considered judgment. *Pacheco*, 27 Vet.App. at 26. Therefore, in *Pacheco* this Court did not follow the Supreme Court’s guidance in *Kisor*.

B. THE HOLDING IN *KISOR* REQUIRES THIS COURT TO EXHAUST ALL THE TRADITIONAL TOOLS OF CONSTRUCTION BEFORE AFFORDING AGENCY DEFERENCE

As discussed above, *Kisor* requires this court to **exhaust** all the **traditional tools of construction** before resorting to deference to the Agency’s interpretation. *Kisor*, 139 S.Ct. at 2405 (emphasis added). The Supreme Court explained that a court must first consider:

[T]he **text, structure, history, and purpose of a regulation**, in all the ways it would if it had no agency to fall back on.

Kisor, 139 S.Ct. at 2416. (emphasis added), prior to affording agency deference.

Thus, this Court must first consider all the established rules of textual construction, prior to giving the agency deference. These rules include the rule that a regulation must be interpreted “so that effect is given to all its provisions.” *Roper v. Nicholson*, 20 Vet.App. 173, 178 (2006). Additionally, the regulation’s use of the disjunctive “or” provides for an independent basis rather than an additional requirement. *Drosky v. Brown*, 10 Vet.App. 251, 255 (1997); see also *Viegas v. Shinseki*, 705 F.3d 1374, 1378 (Fed. Cir. 2018) (observing that a court should “eschew a strained construction’ of a statute that ‘would . . . ignore the disjunctive “or” contained in the statutory text”).

When this Court carefully considers these rules of statutory construction regarding 38 C.F.R. § 3.157(b), the Appellant maintains that this Court would find that there was no genuine ambiguity in the regulation. Indeed, the Court will find that this regulation, as it existed in 1985, would allow for an informal claim either to reopen “or” for an increased rating claim.

C. THE HOLDING IN *KISOR* REQUIRES THIS COURT TO CONDUCT AN INDEPENDENT INQUIRY ON WHETHER THE CHARACTER AND CONTEXT OF THE AGENCY’S INTERPRETATION ENTITLES IT TO DEFERENCE WHEN THE REGULATION IS GENUINELY AMBIGUOUS

Should the Court find the regulation to be genuinely ambiguous after exhausting all the traditional tools of construction, then the Court must not only determine if the agency’s interpretation is reasonable but must also conduct an “independent inquiry” on the character and context of the interpretation. See *Kisor*,

139 S.Ct. at 2416. In explaining the reasonableness test the Supreme Court corrected the degree of deference many courts give an agency. The Court held:

Some courts have thought . . . that at this stage of the analysis, agency constructions of rules receive greater deference than agency constructions of statutes. [cite]. But that is not so. Under *Auer*, as under *Chevron*, the agency's reading must fall 'within the bounds of reasonable interpretation.' [cite]. **And let there be no mistake: That is a requirement an agency can fail.**

Id. (emphasis added).

The Supreme Court further explained that “**not every reasonable agency reading of a genuinely ambiguous rule should receive Auer deference.**” *Id.* (emphasis added). The Supreme Court explained that a court's inquiry “**does not reduce to any exhaustive test.**” *Id.* (emphasis added). Yet, the Supreme Court explained that it had laid out “some especially important markers” for “when Auer deference is and is not appropriate.” *Id.*

These markers for the agency's proposed interpretation include: the interpretation must be the agency's official position (and not an ad hoc statement), the agency's interpretation must implicate its substantive expertise, and the agency's reading of a rule must reflect “fair and considered judgment.” *Id.* at 2416-2417. The last marker requires that the proposed interpretation not be simply a “convenient litigating position” or a “post hoc rationalization advanced” to “defend past agency action against attack.” *Id.* at 2417; citing *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012). Moreover, the proposed interpretation

must **not** create “unfair surprise” to regulated parties. *Id.* at 2418 (emphasis added); *citing Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007).

The Court did not undertake this independent inquiry in *Pacheco*. Instead, in *Pacheco* this Court explained:

Given the **ambiguity in the regulation, the Secretary’s interpretation will be afforded deference** so long as it is not plainly erroneous or inconsistent with the regulation.

Id. (emphasis added). In *Pacheco* the Court gave the presumption to the Agency interpretation **unless** it is shown that their interpretation was not warranted. In *Kisor*, the Supreme Court directed courts to independently inquire into the Secretary’s proposed interpretation **before affording deference**. This is an essential difference!

**D. IT IS IMPORTANT TO REMEMBER MR. RORIE’S CLAIM WAS
ORIGINALLY ONE CLAIM FOR A BILATERAL FOOT DISABILITY THAT
VA SEPARATED**

In this case Mr. Rorie initially brought a claim for a bilateral foot disability that he described as “flat feet” in June 1970. [Record Before the Agency (R.) at 20550-20553]. It was not Mr. Rorie’s responsibility to precisely identify what foot (or feet) disability he had as a veteran is only competent to provide symptoms of his disability and VA should not expect or require a claimant veteran to have “the legal or medical knowledge to narrow the universe of his claim.” *Ingram v. Nicholson*, 21 Vet.App. 232, 256 (2007).

The Regional Office (RO) in the first Rating Decision awarded service connection for bilateral pes planus and assigned a non-compensable rating. [R.

at 20536-20537]. Mr. Rorie appealed the rating for his bilateral foot disability. [R. at 20520, 20517, 20475-20481, 20452-20453]. As part of his bilateral foot disability appeal, he provided testimony that his feet sweat in-service which produced blisters and scabs. See [R. at 20479-20480 (R. at 20475-20481)]. The Board remanded his claim in a January 1974 decision. [R. at 20418-20420]. The RO then increased Mr. Rorie's pes planus to a 10 percent rating in March 1974. [R. at 20404]. Mr. Rorie continued to appeal an increased rating for his bilateral foot disability. [R. at 20303, 20309, 20218, 20212-20213]. As part of his March 1981 appeal, Mr. Rorie explained that he was seeking "an increased evaluation for a service-connected flat feet." [R. at 20212]. In this appeal, in addition to discussing the "pronation" of his feet, Mr. Rorie explained that his doctor had documented a "**chronic** tinea infection." [R. at 20213] (emphasis added). The Board denied a higher rating for his bilateral foot disability both in March 1980 and April 1982. [R. at 20279-20282, 20182-20185].

In April 1983 Mr. Rorie continued to seek an increase for his bilateral foot disability. [R. at 20179]. He explained "[b]ecause of increased pain/discomfort and a worsening skin irritation on my feet" he was "requesting" "re-evaluation of [his] disability compensation for flat feet." *Id.* The RO in the July 1983 Rating Decision denied an increase and denied tinea pedis. [R. at 20162]. In his July 1983 Notice of Disagreement, Mr. Rorie explained that he was appealing the denial of his "claim for increased compensation due to worsening pes planus and a skin condition." [R. at 20153]. In his December 1983 appeal, Mr. Rorie continued to

reference both his tinea pedis and pes planus as an increased rating claim. See [R. at 20128-20134]. The Board in a March 1985 decision separated the two bilateral foot conditions and denied both a higher rating for pes planus and entitlement to service connection for tinea pedis. [R. at 20085-20092]. When Mr. Rorie attempted to re-raise this issue, he still referenced both conditions as an increased rating claim. See [R. at 20075, 19966].

At no time did Mr. Rorie raise a separate claim for tinea pedis! Throughout the 1970's and 1980's Mr. Rorie included all the symptoms of his bilateral foot disability together (both his functioning bilateral foot pain and his sores and infection on his feet). See [R. at 20475-20481, 20212-20213, 20179, 20153, 20128-20134, 20075, 19966]. **It is the VA that split the bilateral foot disability claim up into two and classified his tinea pedis symptoms as a separate claim from his pes planus.** See [R. at 20162, 20085-20092].

E. PROPERLY APPLYING *KISOR*'S TEST AND PRECEDENT FOR REGULATION INTERPRETATION TO 38 C.F.R. § 3.157(b) WARRANTS A DIFFERENT INTERPRETATION THAN THAT SET OUT IN *PACHECO*, ESPECIALLY IN THIS CASE

The regulation in effect in August 1985 was as follows:

(b) *Claim*. Once a formal claim for pension or compensation has been allowed or a formal claim for compensation disallowed for the reason that the service-connected disability is not compensable in degree, receipt of one of the following will be accepted as an informal claim for increased benefits or an informal claim to reopen. . .

(1) *Report of examination or hospitalization by Veterans Administration or uniformed services. . .*

38 U.S.C. § 3.157(b) (1985). As discussed above, applying *Kisor*'s test for regulation interpretation requires this Court to first **exhaust** all the **traditional tools of construction** before resorting to deference to the Agency's interpretation. *Kisor*, 139 S.Ct. at 2405 (emphasis added). When considering the rules of textual construction, the Court should consider both the rule that a regulation must be interpreted "so that effect is given to all its provisions," (*Roper*, 20 Vet.App. at 178) and the rule that the regulation's use of the disjunctive "or" provides for an independent basis rather than an additional requirement. *Drosky*, 10 Vet.App. at 255; see also *Viegas*, 705 F.3d at 1378. Therefore, the examination report may serve as both an informal claim for increased benefits "or" an informal claim to reopen.

This interpretation of the regulation particularly makes sense in Mr. Rorie's case because he initially filed a claim for a bilateral foot disability that was "allowed" or "granted." VA awarded service connection for pes planus, first at a non-compensable rating and then at a 10% rating. Mr. Rorie continued to appeal these decisions requesting an increased rating for his feet, including the scabs/irritation/infection of his feet. See [R. at 20520, 20517, 20479-20480, 20452-20453, 20303, 20309, 20218, 20212-20213, 20179, 20153, 20128-20134], Mr. Rorie never brought a separate claim for tinea pedis, but the VA treated his skin irritation/tinea pedis on his feet as a separate issue. See [R. at 20162, 20085-20092]. Therefore, based upon these facts Mr. Rorie meets the plain meaning of the regulation in 1985. His claim for a bilateral foot disability was "allowed" and

because part of the disability on his feet was treated separately by the VA as not warranting service connection, it is a claim to “reopen.” The purpose of this regulation is consistent with this interpretation as Mr. Rorie was not seeking to raise a new and different claim for the first time with an examination report. Instead, he had been seeking higher ratings for his bilateral foot disability that included his skin irritation/tinea pedis for several years.

Even if this Court finds the regulation, 38 C.F.R. § 3.157(b)(1985), to be genuinely ambiguous, the Court should not give deference to the agency’s interpretation in this case. First, and foremost, the Court must resolve interpretive doubt **in favor of the veteran**. *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (emphasis added); *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 692 (Fed. Cir. 2000) (traditional Chevron analysis is modified by the doctrine that interpretive doubt is to be resolved in the veteran’s favor); *see also Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009) (“The VA disability compensation system is not meant to be a trap for the unwary, or a stratagem to deny compensation to a veteran who has a valid claim . . .”). Judge Greenberg, in *Pacheco*’s dissent, warned against rushing toward agency deference when it denies benefits in veteran cases. He explained:

Our Court **must not continue to show deference** to the Secretary’s interpretations of statutes and regulations where, as here, doing so **contravenes the long-applied veterans ‘canon** that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries favor.’

Pacheco, 27 Vet.App. at 42 (emphasis added). Therefore, the Court should not give the agency interpretation deference to deny Mr. Rorie the benefit of an earlier effective date because of an ambiguous regulation. This is especially so when it is only a claim to “reopen” because VA categorized the bilateral foot disability as two different claims.

Secondly, the *Kisor* test requires an “independent inquiry” by the Court **before** agency deference may be awarded. See *Kisor*, 139 S.Ct. at 2416 (emphasis added). As discussed above, the Supreme Court explained that although a court’s independent inquiry “does not reduce to any exhaustive test” it had laid out “some especially important markers” for “when *Auer* deference is and is not appropriate.” *Id.* These markers include determining whether the agency’s interpretation is its “official position,” whether it in “some way implicate[s] [the agency’s] substantive expertise,” and should not be “*post hoc* rationalization” or create “unfair surprise.” *Id.* at 2416-2418.

In *Pacheco* the Secretary advanced the regulation interpretation for § 3.157(b) that a veteran may never use a medical report as an informal claim to reopen for any disability wherein service connection had not yet been established. See *Pacheco*, 27 Vet.App. at 25. The Secretary seeks to use this same prohibition against Mr. Rorie because tinea pedis was not separately service-connected at the time of the August 5, 1985, medical record. See Secretary’s Brief at 6-10.

However, this interpretation was not the Secretary’s “official position” in 1985. This is made clear by the Secretary’s comments in the Federal Register

when he revised the regulation in 1987. In 1987 the Secretary proposed adding to the regulation and explained that it was to clarify that an examination could serve as an informal claim either when service connection had already been established “or” when a formal claim had been filed within one year. *Medical Reports as Informal Claims/Recoupment of Separation Pay*, 52 Fed. Reg. 3,286, 3,286 (Feb. 3, 1987).

Indeed, in *Pacheco* the Court relied upon comments by the Secretary in November 2013 about 38 C.F.R. § 3.156(b) never applying to claims which had not yet been service connection. See *Pacheco*, 27 Vet.App. at 27; see also *VA Compensation and Pension Regulation Rewrite Project*, 78 Fed. Reg. 71,042, 71,069 (Nov. 27, 2013). However, this statement made by the Secretary in November 2013 directly contradicts earlier statements made by the Secretary in 1993 and 1987. See *Zero Percent Disability Evaluations*, 58 Fed. Reg. 28,808, 28,808-09 (May 17, 1993); see also *Medical Reports as Informal Claims/Recoupment of Separation Pay*, 52 Fed. Reg. 3,286, 3,286 (Feb. 3, 1987). It is of interest that the VA proposed to completely do away with informal claims all together less than a year later. See *Standard Claims and Appeals Forms*, 79 Fed. Reg. 57660 (Sep. 25, 2014). Therefore, this comment by the Secretary nearly 30 years later is “post hoc rationalization” and does not constitute their official position in 1985. See *Kisor*, 139 S.Ct. at 2416-2417. Additionally, there is no evidence that the Secretary’s regulation interpretation advanced in *Pacheco* “some way implicate[s] [the agency’s] substantive expertise.” See *id* at 2417.

Moreover, as applied to Mr. Rorie's case the Secretary's regulation interpretation creates "unfair surprise" to this *pro se* veteran. Mr. Rorie raised a claim for a bilateral foot disability in June 1970. See [R. at 20550-20553]. This claim was granted and identified as pes planus. See [R. at 20536]. Mr. Rorie consistently appealed the rating for his bilateral foot disability. See [R. at 20520, 20517, 20452-20453, 20303, 20309, 20218, 20212-20213, 20179, 20153, 20128-20134]. VA bifurcated his bilateral foot disability into two claims, pes planus and tinea pedis. See [R. at 20162, 20085-20092]. Due to VA's characterization of Mr. Rorie's tinea pedis part of a bilateral foot claim, VA seeks now, *post hoc*, to deny benefits of an earlier effective date. This is "unfair surprise." See *Kisor*, 139 S.Ct. at 2418. Therefore, as applied to these facts the *Kisor* Test and pro-veteran canon require this Court to award Mr. Rorie the effective date of August 5, 1985.

III. CONCLUSION

Wherefore, as outlined in the above discussion, the Appellant, Mr. James Rorie, responds to Court's questions in the November 20, 2023, Court Order.

Respectfully submitted,

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APPENDIX

**(Record Citations not contained in the Record of
Proceeding)**

6/15

1990 flashed

Form approved Budget Bureau No. 76-R0007

6/15 64/A

VETERANS ADMINISTRATION				(DO NOT WRITE IN THIS SPACE)	
DATE <u>6-16-70</u> BY <u>JC</u>				25640164	
VETERAN'S APPLICATION FOR COMPENSATION OR PENSION					
IMPORTANT: Read attached General and Specific Instructions before filling in this form. Type-write, print or write plainly.					
1. LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN <u>RORIE JAMES W.</u>				2. SOCIAL SECURITY NO. <u>084-38-0329</u>	
3A. MAILING ADDRESS OF VETERAN (No. and street or rural route, city or P. O., State, and ZIP Code) <u>4114 NORTH ST.</u> <u>DETROIT, MICH. 48205</u>				3B. TELEPHONE NO. <u>789</u> <u>3693</u>	
5. DATE OF BIRTH <u>5-11-49</u>		6. PLACE OF BIRTH <u>Lumberton, N.C.</u>		7. SEX <input checked="" type="checkbox"/> MALE <input type="checkbox"/> FEMALE	
SERVICE INFORMATION					
NOTE: Enter complete information for each period of active duty including Reservist or National Guard status. Attach Form DD 214 or other separation papers for all periods of active duty since January 31, 1955, to expedite processing of your claim.					
8A. ENTERED ACTIVE SERVICE		8B. SERVICE NO		8C. SEPARATED FROM ACTIVE SERVICE	
DATE PLACE		DATE PLACE		8D. GRADE, RANK OR RATING, ORGANIZATION AND BRANCH OF SERVICE	
<u>8-30-67</u> <u>Detroit</u>		<u>2386035</u> <u>5-28-70</u>		<u>Cpl. 1st Lt.</u> <u>U.S. M.C., 1st BN.</u> <u>6th MARINES</u> <u>U.S. M.C.</u>	
<u>Mich.</u>					
9. IF YOU SERVED UNDER ANOTHER NAME, GIVE NAME AND PERIOD DURING WHICH YOU SERVED <u>NONE</u>					
10. IF RESERVIST OR NATIONAL GUARDSMAN, GIVE BRANCH OF SERVICE AND PERIOD OF ACTIVE OR INACTIVE TRAINING DUTY DURING WHICH DISABILITY OCCURRED <u>SEE Pa to 8d.</u>					
11. ARE YOU NOW A MEMBER OF THE RESERVE FORCES OF THE ARMY, NAVY, AIR FORCE, MARINE CORPS, COAST GUARD OR THE NATIONAL GUARD? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO (If "Yes," complete 11B)				11B. BRANCH OF SERVICE <u>U.S. M.C.</u>	
12A. HAVE YOU PREVIOUSLY FILED A CLAIM FOR ANY BENEFIT WITH THE VETERANS ADMINISTRATION? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO (If "Yes," complete 12B and 12C)				12B. CLAIM NUMBER <u>Pending</u>	
12C. WHERE DID YOU FILE YOUR CLAIM? (City and State) <u>Detroit Mich.</u>					
13A. ARE YOU NOW RECEIVING RETIREMENT OR RETAINER PAY FROM THE ARMED FORCES? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO (If "Yes," complete 13B and 13C)				13B. BRANCH OF SERVICE	
				13C. MONTHLY AMOUNT \$	
14A. HAVE YOU EVER APPLIED FOR OR RECEIVED DISABILITY SEVERANCE PAY FROM THE ARMED FORCES? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO (If "Yes," complete 14B)				14B. AMOUNT \$	
15A. HAVE YOU RECEIVED LUMP SUM READJUSTMENT PAY FROM THE ARMED FORCES? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO (If "Yes," complete 15B)				15B. AMOUNT \$	
16. HAVE YOU EVER FILED A CLAIM FOR COMPENSATION FROM THE U.S. BUREAU OF EMPLOYEES COMPENSATION? (Formerly the U. S. Employees Compensation Commission) <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO					
17A. ARE YOU NOW OR HAVE YOU BEEN HOSPITALIZED OR FURNISHED DOMICILIARY CARE WITHIN THE PAST THREE MONTHS? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO (If "Yes," complete 17B and 17C)		17B. DATES OF HOSPITALIZATION OR DOMICILIARY CARE		17C. NAME AND ADDRESS OF INSTITUTION <u>MA2501</u> <u>Bldg 2-22-70</u> <u>6-22-70</u> <u>CHP 6-22-70</u> <u>MAJ</u>	

3101 to pool Record Before the Agency. Code FIN

18. NATURE OF SICKNESSES, DISEASES OR INJURIES FOR WHICH THIS CLAIM IS MADE AND DATE EACH BEGAN

FIAT FEET - Oct. 1967
 Kidney Infection -
 Oct. 1967
 Condition of EARS - MAR. 1970

NOTE: Items 19, 20 and 21 need NOT be completed unless you are now claiming compensation for a disability incurred in service.

IF YOU RECEIVED ANY TREATMENT WHILE IN SERVICE, FILL IN THE FOLLOWING INFORMATION

19A. NAME, NUMBER, OR LOCATION OF HOSPITAL, FIRST-AID STATION, DRESSING STATION, OR INFIRMARY	19B. DATES OF TREATMENT	19C. NATURE OF SICKNESS, DISEASE OR INJURY
Q. FORT DETON, CAL.	Oct. 1967	FIAT FEET
Donna - HOA, V.N.	JUNE 1968	FIAT FEET
Cp. Lejeune, N.C.	April 1970	Kidney Cond.
" " " "	MAR. 1970	EARS

LIST CIVILIAN PHYSICIANS AND HOSPITALS WHERE YOU WERE TREATED FOR ANY SICKNESS, INJURY OR DISEASE SHOWN ABOVE BEFORE, DURING, OR SINCE YOUR SERVICE, AND ANY (MILITARY) HOSPITALS SINCE YOUR LAST DISCHARGE.

20A. NAME	20B. PRESENT ADDRESS	20C. DISABILITY	20D. DATE
NONE			

LIST PERSONS OTHER THAN PHYSICIANS WHO KNOW ANY FACTS ABOUT ANY SICKNESS, DISEASE OR INJURY WHICH YOU HAD BEFORE, DURING, OR SINCE YOUR SERVICE

21A. NAME	21B. PRESENT ADDRESS	21C. DISABILITY	21D. DATE
Tony Bultock	N.C. Co. 2nd Div.	FEET	SINCE July 1967
Joseph Breaux	Cp. Lejeune, N.C.	Kidney	SINCE Apr. 1970
DR. Sterling	Box 70, BSA Grove, LA.	"	" " "
	Cp. Lejeune, N.C.	FIAT FEET	SINCE MAY 1969

22. MARITAL STATUS (Check one)

☒ NEVER MARRIED (If so, do not complete 23 through 27D)☐ MARRIED☐ WIDOWED☐ DIVORCED

23. NUMBER OF TIMES YOU HAVE BEEN MARRIED

24. NUMBER OF TIMES YOUR PRESENT SPOUSE HAS BEEN MARRIED

FURNISH THE FOLLOWING INFORMATION ABOUT EACH OF YOUR MARRIAGES

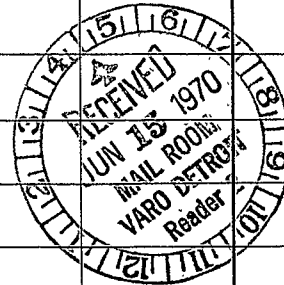
25A. DATE AND PLACE OF MARRIAGE	25B. TO WHOM MARRIED	25C. HOW MARRIAGE TERMINATED (Death, divorce)	25D. DATE AND PLACE TERMINATED
Tony Bultock	N.C. Co. 2nd Div. Cp. Lejeune, N.C.		

FURNISH THE FOLLOWING INFORMATION ABOUT EACH PREVIOUS MARRIAGE OF YOUR PRESENT SPOUSE				
26A. DATE AND PLACE OF MARRIAGE	26B. TO WHOM MARRIED	26C. HOW MARRIAGE TERMINATED (Death, divorce)	26D. DATE AND PLACE TERMINATED	
27A. DO YOU LIVE TOGETHER? <input type="checkbox"/> YES <input type="checkbox"/> NO (If "No," fill in 27B, 27C and 27D)	27B. REASON FOR SEPARATION	27C. AMOUNT YOU CONTRIBUTE TO YOUR WIFE'S SUPPORT MONTHLY \$	27D. PRESENT ADDRESS OF SPOUSE	
LIST EACH OF YOUR LIVING UNMARRIED CHILDREN WHO IS: (A) UNDER 18 YEARS OLD OR (B) OVER 18 AND UNDER 23 YEARS AND ATTENDING SCHOOL, OR (C) CHILD OF ANY AGE WHO BECAME PERMANENTLY INCAPABLE OF SELF-SUPPORT DUE TO PHYSICAL OR MENTAL ILLNESS BEFORE AGE 18.				
28A. FULL NAME OF CHILD	28B. DATE OF BIRTH (Month, day, year)	28C. PLACE OF BIRTH	28D. NAME AND ADDRESS OF PERSON HAVING CUSTODY OF CHILD	
NOTE - If any child above is over 18 years old, identify in Item 45, "Remarks," and indicate whether attending school or permanently incapable of self-support.				
29A. IS YOUR FATHER DEPENDENT UPON YOU FOR SUPPORT? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO (If "Yes," fill in 29B)	29B. NAME AND ADDRESS OF DEPENDENT FATHER		30A. IS YOUR MOTHER DEPENDENT UPON YOU FOR SUPPORT? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO (If "Yes," fill in 30B)	
30B. NAME AND ADDRESS OF DEPENDENT MOTHER	31A. NAME AND ADDRESS OF NEAREST RELATIVE <i>VERNON ADKIE SK. 854 E. 215th ST. BROOKLYN, N.Y.</i>		31B. RELATIONSHIP OF NEAREST RELATIVE <i>FRATERNAL</i>	
FURNISH THE FOLLOWING INFORMATION IF YOU CLAIM TO BE TOTALLY DISABLED				
32. DO YOU CLAIM TO BE TOTALLY DISABLED? (Veterans 65 years of age or older need not complete this item, or 33A to 40 inclusive) <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO (If "Yes," complete 33A to 40, inclusive)	33A. ARE YOU NOW EMPLOYED? <input type="checkbox"/> YES <input type="checkbox"/> NO (If "No," fill in 33B)		33B. DATE YOU LAST WORKED	
LIST ALL YOUR EMPLOYMENT, INCLUDING SELF-EMPLOYMENT, FOR 1 YEAR BEFORE YOU BECAME TOTALLY DISABLED				
34A. NAME AND ADDRESS OF EMPLOYER	34B. KIND OF WORK	34C. MONTHS WORKED	34D. TIME LOST FROM ILLNESS	34E. TOTAL EARNINGS
LIST ALL YOUR EMPLOYMENT, INCLUDING SELF-EMPLOYMENT, SINCE YOU BECAME TOTALLY DISABLED				
35A. NAME AND ADDRESS OF EMPLOYER	35B. KIND OF WORK	35C. MONTHS WORKED	35D. TIME LOST FROM ILLNESS	35E. TOTAL EARNINGS
36. IF YOU WERE SELF-EMPLOYED BEFORE BECOMING TOTALLY DISABLED, JUST WHAT PART OF THE WORK DID YOU DO?		37. IF YOU ARE STILL SELF-EMPLOYED, JUST WHAT PART OF THE WORK DO YOU DO NOW?		
38A. WHAT IS THE MOST YOU EVER EARNED IN ANY ONE YEAR? \$	38B. WHAT YEAR?	38C. KIND OF WORK IN YEAR YOU EARNED THE MOST		
39. EDUCATION (Circle highest year completed)		40. NATURE OF AND TIME SPENT IN OTHER EDUCATION AND TRAINING		
1 2 3 4 5 6 7 8 1 2 3 4 1 2 3 4				
(GRADE SCHOOL) (HIGH SCHOOL) (COLLEGE)				

41. INCOME RECEIVED AND EXPECTED FROM ALL SOURCES

NOTE. - Items 41A through 41C should be completed only if you are applying for nonservice-connected pension. (Veterans of Indian Wars, Spanish American War, Boxer Rebellion, or Philippine Insurrection need not complete these items.)

TYPE OF INCOME (41A)	SOURCE (41B)	AMOUNT RECEIVED FROM JANUARY 1 TO DATE YOU SIGN THIS APPLICATION		AMOUNT EXPECTED FROM DATE YOU SIGN THIS APPLICATION TO END OF THIS CALENDAR YEAR		AMOUNT EXPECTED FOR THE NEXT CALENDAR YEAR	
		VETERAN (41C)	WIFE (41D)	VETERAN (41E)	WIFE (41F)	VETERAN (41G)	WIFE (41H)
TOTAL WAGES 1. OR SALARY		\$	\$	\$	\$	\$	\$
SOCIAL 2. SECURITY							
OTHER 3. RETIREMENT AND ANNUITIES							
DIVIDENDS AND 4. INTEREST							
UNEMPLOYMENT 5. COMPENSATION							
NET RENTAL 6. INCOME							
NET PROFIT FROM SELF-EMPLOYMENT 7. OR BUSINESS							
NET PROFIT 8. FROM FARM							
OTHER INCOME 9. (Specify source)							
TOTAL 10. INCOME		\$	\$	\$	\$	\$	\$



STATEMENT OF YOUR NET WORTH-NOTE - Read Specific Instructions for Items 42A to 42E, inclusive.

42A. STOCKS, BONDS, BANK DEPOSITS, ETC.	42B. REAL ESTATE	42C. OTHER PROPERTY	42D. TOTAL DEBTS	42E. NET WORTH	43 IF CLAIM IS FILED IN BEHALF OF AN INCOMPETENT VETERAN, DOES THE VALUE OF HIS ESTATE EQUAL OR EXCEED \$1,500?
\$	\$	\$	\$	\$	<input type="checkbox"/> YES <input type="checkbox"/> NO

GROSS INCOME FROM SELF-EMPLOYMENT ON FARM OR BUSINESS OPERATION

NOTE: Answer 44A to 44C, inclusive, only if you are self-employed or operate a farm or business. List items 44A, 44B and 44C under "Remarks" and give detailed explanation.

44A. TOTAL INCOME LAST YEAR	44B. TOTAL INCOME SO FAR THIS YEAR	44C. EXPECTED INCOME FOR REMAINDER OF YEAR
\$	\$	\$

45. REMARKS (Identify your statements by their applicable item numbers. If additional space is required, attach separate sheet and identify your statements by their item numbers.)

CERTIFICATION AND AUTHORIZATION FOR RELEASE OF INFORMATION -- I certify that the foregoing statements are true and complete to the best of my knowledge and belief. I CONSENT that any physician, surgeon, dentist or hospital that has treated or examined me for any purpose, or that I have consulted professionally, may furnish to the Veterans Administration any information about myself and I waive any privilege which renders such information confidential.

46. DATE SIGNED 6/1/70	47. SIGNATURE OF CLAIMANT SIGN HERE
---------------------------	--

NOTE - Signature made by mark must be witnessed by two persons to whom the person making the statement is personally known; and the signatures and addresses of such witnesses must be shown below.

48A. SIGNATURE OF WITNESS	48B. ADDRESS OF WITNESS
49A. SIGNATURE OF WITNESS	49B. ADDRESS OF WITNESS

PENALTY -- The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false, or for the fraudulent acceptance of any payment to which you are not entitled.

NOTE - SHADED AREAS TO BE COMPLETED BY INPUT ACTIVITY

1. COPY TO <input checked="" type="checkbox"/> MINS. <input type="checkbox"/> MED			<input type="checkbox"/> OE FOLDER <input type="checkbox"/> R & E FOLDER			<input type="checkbox"/> OTHER (Specify)			RATING DECISION			2. FILE NUMBER 25 640 164			
3. TRANS. CODE		4. DATE OF ISSUE		5. LAST EXAMINATION 09-14-70			6. DATE OF DEATH			7. INITIALS AND SURNAME OF VETERAN J. W. RORIE					
8. TYPE OF RATING 1		9. SEX <input checked="" type="checkbox"/> MALE <input type="checkbox"/> FEMALE		10. BRANCH C		11. ACTIVE DUTY (Mo., day, yr.) EOD 05-30-67 RAD 05-28-70		12. ADDTL. SVC. 1. WT. 2. PTE 3. SCD		13. DATE OF BIRTH (Mo., day, yr.) 05-11-49		14. COMBAT 1. NONE 2. COMP 3. NON COMP 4. BOTH		15. EMPLOYABILITY 1. EMPLOYABLE OR NOT AN ISSUE 2. UNEMPLOYABLE	
16. COMPETENCY 1. COMPETENT OR NOT AN ISSUE 2. INCOMPETENT		17. NO. OF S/C DISAB. (8 through 21) (9 to Show 9 or more)		18. FUTURE DATE CONTROLS PHYSICAL EXAM. MO. YR. REASON no-exam. 01						OTHER CONTROL ACT. MO. YR. REASON		19. DATE OF THIS RATING 10-21-70			

20. NARRATIVE

J: Original claim, 6/15/70.

I: Service-connection for flat feet; condition of the kidney and ear condition.

F: The veteran's enlistment examination of 6/19/67 was negative. The veteran has a record of several complaints of sore feet during his military service. An examination on 1/24/68, showed pes planus, bilateral. He had subsequent complaints of sore feet with a diagnosis of bilateral pes planus. On 9/11/69, pes planus was diagnosed with a recommendation of ripple sole shoes.

As to a kidney condition, records show the veteran had treatment for burning on urination with discharge. No kidney condition was diagnosed before this treatment. The veteran's clinical records show no later treatment for any type of GU Condition.

There is no evidence in the veteran's service medical records of treatment for an ear condition.

On the VA Examination, the veteran indicated he had vague present symptoms of urinary frequency. However, examination showed no urethral discharge, normal external genitalia and normal prostate. The examiner states he has history of urinary frequency only.

The examination of his feet showed depressed arches with no excessive plantar calluses. There was no lesion and he had normal function.

1. SC 38 USC 310 (INC. V.E.)

0% from 5/29/70.

PES PLANUS, BILATERAL.

Record Before the Agency

CONTINUATION SHEET RATING DECISION

NAME OF VETERAN

J. W. RORIE

CLAIM NUMBER

C- 25 640 164

PAGE

OF RATING DATED: 10/21/70

36. KIDNEY CONDITION AND EAR CONDITION, claimed by the veteran, not shown by the evidence of record.

21. SPECIAL PROVISION CODE

1-PAR 29 3-VAR 1321 5-ANAL RATING
2-PAR 30 4-VAR 1322 6-OTHER OR COMB

22. SPECIAL MONTHLY COMPENSATION

A SMC PAR CODE B LOSS OF USE C ANAT. LOSS D OTHER LOSS

24. CLAIMANT REPRESENTED BY:

☐ AL ☐ VFW ☐ DAV ☐ ARC ☐ AMVETS ☐ OTHER (Specify)

27. RATING SPECIALIST (Medical)

S. A. CROWDER, D.O. CHM ☐

28. RATING SPECIALIST (Legal-Occupational)

J. B. BRENNER CHM ☒

25. RATING BOARD NO.

D JBB:mt

26. R.O. NO.

N 329


VA FORM
MAY 1968

21-6796b

SUPERSEDES VA FORM 21-6796b,
AUG 1963, WHICH WILL NOT BE USED

Record Before the Agency

* GPO

VETERANS ADMINISTRATION		CLAIM NO
STATEMENT IN SUPPORT OF CLAIM		329/R/2A
NOTE.--If additional space is needed, use reverse.		
LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN (Type or print)		
RORIE, James W.		C- 25 640 164.
The following statement is made in connection with a claim for benefits in the case of the above named veteran.		
<p>The initial letter that I sent, in order to qualify for disability should have contained enough documented information. It named specific times and places, in addition to the naval doctors and corpsmen who treated me. In fact, I do not believe that my service health record was ever examined. Up until April 1971, it was at the Marine Reserve Center which I had temporarily joined. If further information is needed, please do not hesitate to contact me.</p>		
<p>S. S. No. 084-28-0329</p>		
I CERTIFY that the foregoing statements are true and correct to the best of my knowledge and belief.		
DATE SIGNED	SIGNATURE	
5/71	SIGN HERE  James W. Rorie	
ADDRESS		
4114 North St. Flint Mich. 48505		
PENALTY - The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false.		

VETERANS ADMINISTRATION

STATEMENT IN SUPPORT OF CLAIM

CLAIM NO.

NOTE.--If additional space is needed, use reverse.

LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN (Type or print)

RORIE, James W.

C- 25 640 164

The following statement is made in connection with a claim for benefits in the case of the above named veteran:

Dear Sir:

I would like to be re-examined, because I feel the first examination was incomplete. Furthermore, I would like my service record health book on hand for the examining doctor to refer to; also I would like it re-examined by the appeal board. I disagree with the former decision and feel that no concrete attempts have been made in a thorough examination of my service health records, which should concur with the statements made by me to you in the letter of Sept. 5, 1971 naming dates, places, witnesses and naval doctors.

Sincerely yours,

I CERTIFY that the foregoing statements are true and correct to the best of my knowledge and belief.

DATE SIGNED

SIGNATURE

11/28/71

SIGN
HERE

James W. Rorie

ADDRESS

4114 North Street, Flint, Michigan 48505

PENALTY - The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false

VETERANS ADMINISTRATION REGIONAL OFFICE, DETROIT, MICHIGAN

RORIE, James W.

C 25 640 164

APPEAL HEARING held before Rating Board #4 on Wednesday, May 2, 1973 at 3:30 P.M.

H. J. GOODMAN, Chairman
J. H. STONE
S. A. CROWDER, D.O.

The veteran made a personal appearance accompanied by Mr. V. Walter Kotch, Service Officer of the Disabled American Veterans.

(The veteran was duly sworn.)

ISSUE ON APPEAL:

MR. GOODMAN: Mr. Rorie, you have been granted service connection for a disability diagnosed as pes planus or in layman's terminology flat feet. You were examined in October 1972 and based on this examination an evaluation of 0% was continued. In addition, service connection was disallowed for a disability of cystitis on the basis that the condition was not incurred in service. In addition, service connection was disallowed for an ear condition for the reason that no ear disability was noted on the examination of October 4, 1972.

Mr. Rorie, you have filed a notice of disagreement from these determinations, contending that you should have a compensable evaluation for your flat feet as well as service connection for the other two disabilities.

Mr. Kotch, as the veteran's representative, will you proceed with your presentation.

MR. KOTCH: Mr. Rorie, your case had been studied here prior to your coming in to see us and it is noted that you expressed your dissatisfaction with the three issues so far, even though your flat feet are recognized as service connected to the degree of 0% and the denial of your urinary condition and your hearing disability. Since there are three issues here, we will take each one separately so we could ask you a few questions relative to each disability.

You have, Mr. Rorie, in your medical records from service back in December 1969 you were treated for a hearing condition at that time which was bleeding bouts from both ears. The records show that you were

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RORIE, James W.

medicated for this and the condition cleared up. There is no further treatment for it while you remained on duty. In fact, the examination at the time of separation was negative.

Then you were called in for an examination for consultation purposes on October 4, 1972 and there was nothing found relative to your hearing. It was described as normal. Now, would you let us know that is the board members, exactly what happened on duty relative to the hearing conditions, how this first happened.

MR. RORIE: Well, the happening pertained to the stay that I had over in Vietnam. I was stationed at Camp Carol which is a military base 20 miles or so outside of Ka Song. The Marine Corps has a large battery of guns there. In fact, the largest guns that they have in the Marine Corps, 175 millimeter howitzers, were there. The position I was in was about 20 feet from the guns and they would repeatedly fire the guns in such a manner that it would shake the entire area that I was in. I was there for about a month and after such a duration of time, I feel that it had an effect on my hearing.

MR. GOODMAN: Mr. Kotch, instead of pursuing the line of questioning as to what happened in service, the real problem now is does he have a hearing disability at the present time. The last examination did not show it so possibly you should pursue that aspect of the case.

MR. KOTCH: We are coming to that, Mr. Chairman. That is the next issue. I wanted to give the veteran's background what his records contained on duty and now we are coming to the point of does he have it at present.

Mr. Rorie, does this hearing condition bother you at the present time?

MR. RORIE: It still persists. I have something similar to being in an airplane where you have a ringing in your ears. I indicated that over there but you know, I spent most of my time in the field and you don't have adequate hospitalization over there. After I got back as was said from the record I received some treatment and I received ear drops but still they didn't irradiate the illness. When I went to the last examination the examiner said that there was some indication that I had a problem but she said it wasn't in her

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opinion severe enough to trouble me with. My contention is that how can you actually go by that unless you are experiencing it yourself.

MR. KOTCH: Mr. Rorie, from what I've seen of your case you did submit a medical report from your doctor that's of record and he mentioned that you were confronted with a buzzing or ringing noise in your ears. Is that still present now?

MR. RORIE: Yes.

MR. KOTCH: Is this what you're complaining now, that this buzzing interferes with your hearing?

MR. RORIE: Right, like I say, it's something similar as to being in an airplane when you take off if you swallow it will discontinue and I have the same malady. If I swallow it will stop and then it will persist after say maybe a couple of minutes it will start over again.

MR. KOTCH: We take it from the examination that your hearing is all right; the only thing that is present now as far as the after effects is the buzzing noise, is that right?

MR. RORIE: Right, well, it's a ringing tone.

MR. KOTCH: Well, in other words, did they tell you this at the Veterans Administration that this ringing was present? Did they identify it at the VA examination?

MR. RORIE: The lady that examined me said that they had detected something and also periodically I have a sore in either ear and luckily the last time that I went I still had one remaining, a swelling of the ear, and she noticed it and she just said it was something normal and whereas like I say it's something that comes and goes.

MR. KOTCH: The only question involving the ear effect here now is we don't know whether we should ask you to produce another medical report from your doctor again to reveal that you have this buzzing sound since you already produced one previously. Mr. Chairman, I don't know whether it would be advisable to reproduce identically what he did previously, if he alleges that he has this tinnitus present.

On the second question, Mr. Rorie, relative to your kidney ailment. You have medical records back in

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service that you were treated for a urinary infection on March 27, 1969 and then on June 10, 1969 treated for both of these conditions successfully and then there was no after effects found. At the time you were leaving service the records were negative which showed no after effects. Then you were examined by the Veterans Administration about four months after discharge dated September 14, 1970 and here again it was negative, no urinary condition was reported.

Did you see a doctor shortly after your discharge for the urinary disability, that is say within a year after discharge?

MR. RORIE: Luckily, I happened to have done so when I entered college I had to go through the trouble of having a physical even though I had been shortly out of the service and my family doctor did detect a small urinary disease and he pointed out that as long as I drank a lot of water it shouldn't bother me too much. But at times I'll have the urge to urinate but when I use the lavatory it doesn't produce anything and this was, I got out May 30, 1970 and I believe this was, the last of July or the first part of August of 1970 that I went to see my family doctor.

MR. KOTCH: May I ask, how did he identify this condition as something that was related back to the event you had in service?

MR. RORIE: Right, it would have to have been because I had only been out for a short period of time and it was the same type of malady I had previously.

MR. KOTCH: Well, naturally, you are in a position to secure that statement, are you not?

MR. RORIE: Right, because this particular doctor which was in 1970 and later I was in an automobile accident and another doctor took a more or less overall examination which included a urinalysis and he pointed out the same thing.

MR. KOTCH: The reason we mentioned this, Mr. Rorie, is because the Veterans Administration examination four months after discharge didn't show anything and the one in 1970 did report a urinary condition. So there is an absence of several years between the date of

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separation to the date it was found so my asking you to produce an early medical report that you were treated for this would be beneficial to your case. So we will ask for you to produce this report so it may have bearing on reconsideration of the kidney ailment.

Mr. Rorie, dealing with the third question this represents your flat feet presently rated at 0% entitles you to outpatient treatment and the right to reopen the case any time you want to you are contending that this is incorrectly rated or should be compensable, is this what you have in mind?

MR. RORIE: Actually, I think it would be better if I started from the beginning from when I first went into the service. I was having some trouble with my feet then and this was indicated on my health record and last doctor that I saw prior to beginning my initial phase of training pointed out that I should receive some type of arch support but I went through the first six weeks of training with sneakers no type of boots at all which I feel hindered my feet.

MR. KOTCH: Can I interrupt you, Mr. Rorie? In other words this disability is rated service connected, the only question now is is it a painful condition now and does it prevent you from following your occupation or the usage of your feet? This is what we're trying to discern at this time. Does it bother you, I mean, is it painful?

MR. RORIE: I quit one job because of the fact that I had to stand continuously and I've been to Detroit several times to see the doctor because of my feet condition and every time I've pointed out that I have blisters on my feet and I have blisters on my feet right now, if you'd care to check.

MR. KOTCH: You were examined by the Veterans Administration October 4, 1972 and apparently everything appeared to be negative on that examination the doctor didn't find any pain or any calluses there or some sort of a clue here. But you are contending that you do have the presence of pain and are subject to blisters, is that what you're saying?

MR. RORIE: That is right. In between my toes it is constantly raw from my feet sweating and I have more or less

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blisters and scabs on my feet.

MR. KOTCH: How would this tie in with flat feet? I mean, how are you developing blisters?

MR. RORIE: It's on the bottom of my foot, I believe it's on the left foot that a bone has dropped down and at the arch I have blisters on both feet.

MR. KOTCH: Is this a one time event or are blisters present most of the time?

MR. RORIE: Most of the time, it's continuous.

MR. KOTCH: Here again, we will probably have to ask you to produce a doctor's statement if this is a new change that's developed since you were last examined because going on the records alone this is not indicated.

We have no further questions at this time, Mr. Chairman.

MR. GOODMAN: Mr. Rorie, what is your urinary condition at the present time, how does it express itself?

MR. RORIE: I would, as I pointed out earlier, have a feeling that I would have to urinate to a great extent but when I went to the lavatory it would only be in moderation, it wouldn't be anything excessive as to what it might have appeared prior to going.

MR. GOODMAN: Does this wake you up in the middle of the night to go to the bathroom?

MR. RORIE: At times but I've learned to more or less control it so that it wouldn't bother me more than once or twice but during the day it's frequent.

MR. GOODMAN: Mr. Stone, do you have any questions?

MR. STONE: No, I don't have any questions.

MR. GOODMAN: Dr. Crowder, do you have any questions?

DR. CROWDER: Yes, Mr. Chairman, Mr. Rorie, in this urinary condition again we were discussing, do you have any pain or burning when you do urinate?

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MR. RORIE: I don't have any pain but at times I have a burning.

DR. CROWDER: Do you have any discharge?

MR. RORIE: No, I don't.

DR. CROWDER: You say that you feel like you have when you have to go to the lavatory that you have a large quantity but you only have a small amount. Is there ever a time when you go and that you cannot urinate at all?

MR. RORIE: No.

DR. CROWDER: There's always some urination when you do feel this urge?

MR. RORIE: Yes.

DR. CROWDER: That concludes my questions, Mr. Chairman.

MR. GOODMAN: Mr. Kotch, do you have anything else to present?

MR. KOTCH: Mr. Chairman, in the light of the oral testimony, the veteran has offered here today it appears to me that he is in a position to produce medical reports covering his urinary condition within one year after discharge and he indicates having trouble with his flat feet here and some after effects that were not projected on the last examination of record plus alleging the tinnitus condition it may be to his advantage to perhaps defer the case for 30 days to give him time to secure medical reports covering these three disabilities, if this is agreeable with the board members.

MR. GOODMAN: Gentlemen, it is my understanding then that Mr. Rorie will submit a medical statement with reference to treatment for his urinary condition shortly after discharge from service and possibly also submit some evidence as to the symptoms of his feet at the present time and as to the buzzing in his ears. We will, accordingly, defer this case for 30 days and upon receipt of this evidence we will again review the case in its entirety and you will be notified. Thank you very much for coming in.

IMPORTANT: Read instructions on reverse side before filling in form. Complete all items fully. Send this appeal to the VA office which made the decision being appealed.

VETERANS ADMINISTRATION

APPEAL

TO

BOARD OF VETERANS APPEALS

1 LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN (Type or print) RORIE, James W.		2 INSURANCE FILE NO., OR LOAN NO. (If pertinent)	3 CLAIM NO. C- 25 640 164
4 SERVICE SERIAL NO. 23 86 035	5. IF APPEAL IS BEING MADE BY A PERSON OTHER THAN VETERAN, INDICATE RELATIONSHIP <input type="checkbox"/> WIDOW <input type="checkbox"/> CHILD <input type="checkbox"/> MOTHER <input type="checkbox"/> FATHER <input type="checkbox"/> OTHER (Specify)		
6. NAME OF CLAIMANT (If other than veteran)		7. ADDRESS OF CLAIMANT (Number & street, city, State & ZIP Code) 1314 W. Myrtle St., Flint, Michigan 48504	
8 DATE OF DECISION BEING APPEALED 7-5-73	9. VA OFFICE WHICH MADE DECISION BEING APPEALED (City & State) V.A. REGIONAL OFFICE, DETROIT, MICH. 48232		
REPRESENTATION See Par. 6 of Instructions on reverse side.		HEARING See Par. 7 of Instructions on reverse side.	
10. I TAKE ISSUE WITH THE DECISION CITED ABOVE AND HEREBY PETITION THE BOARD OF VETERANS APPEALS FOR RELIEF AS SET FORTH BELOW. (State in specific detail the benefits sought on appeal and your reasons for believing that the action appealed from is erroneous. Follow carefully the instructions in paragraph 3 on the reverse side.) <p>I hereby declare the findings of the decisions on my claim to be in error. I am seeking benefits in the amount of a monthly allotment in consideration for the aggravated condition of my feet, kidneys, and ears caused by my tour of duty in the U.S.M.C. I hereby disagree with the following allegations: 6-10-69 a decision was made on my malady and I was prescribed some type of pill; 12-19-69 I was in pain at the time and am now and I did receive further treatment; 4-27-70 the frequency of urination had been several months and the diagnosis was the same as before some type of kidney ailment; 5-26-70 I was suppose to have been kept from receiving my separation papers in order to undergo a series of test for my kidneys and my blood pressure was high, I was still under medication for my ears, and on a profile with limited duty for my feet; 9-14-70 I did have blisters and excessively dry feet due to their constant sweating and functioning was abnormal, I was still experiencing pain with my ears; 11-6-70 the record should have shown all illnesses indicated by me, feet, ears, and kidneys were subject to compensation; 9-9-71 unable to file an appeal any sooner; 3-1-72 I was asking for an appeal at this time; 3-23-72 I received a letter from the V.A. it would be useless to come and report the same information I had sent by letter; 7-18-72 this was sent in on my request after learning from the V.A. it was necessary; 10-4-72 as before I still had pain in my ears and was suffering from high pitch noises, I was still suffering from frequency of urination and I was able to walk with much pain and discomfort, it was said here there was no disease then stated there was chronic cystitis. I need the correct findings in order to respond; 12-7-72 when advised of this I forwarded my disagreement; 3-30-73 I thought that my services record book would be on hand and then I could substantiate all I have been saying; 5-2-73 apparently there was not a zealous attempt to decipher the tape from the oral hearing; 6-8-73 all of the evidence at that time had been submitted and I did not have sufficient funds to have a doctor to duplicate evidence that was</p>			

(Attach additional sheets, if necessary)

11 DATE 8-31-73	12. SIGNATURE OF CLAIMANT (Or representative) James W. Rorie
---------------------------	--

MISSION OF THE BOARD OF VETERANS APPEALS

The Board of Veterans Appeals was established by law to decide appeals for benefits under laws administered by the Veterans Administration (38 U.S.C. 4001-4009). Decisions are made by the Members of a Section of the Board, appointed with the approval of the President. It is the mission of the Board to decide appeals with sympathetic understanding and as promptly as possible, in order to grant all benefits to which veterans and their dependents and beneficiaries are entitled. Decisions are based on the entire record.

GENERAL INFORMATION

The law grants the right to have an adjudication decision reviewed on appeal by the Board of Veterans Appeals. (38 U.S.C. 4004(a)). If you want to appeal, the procedure is as follows:

(1) Write the Veterans Administration office expressing disagreement or dissatisfaction with the decision on the claim. This is a "Notice of Disagreement." It must be filed within one year from the mailing of notice of the decision (60 days where 2 or more persons claim same benefit).

(2) A "Statement of the Case" is then sent the claimant and his representative by the Veterans Administration office. It contains a summary of the facts, the applicable law and regulations and gives the reasons for the decision. Its purpose is to give the claimant sufficient information to complete his appeal in the most effective manner, if appellate review is still desired.

(3) File a "Substantive Appeal." This completes the appeal. Use this form (VA Form 1-9). Follow the instructions below.

INSTRUCTIONS

IMPORTANT: Use this form to file a substantive appeal only after receiving the statement of the case referred to above.

1. **WHO CAN SIGN A SUBSTANTIVE APPEAL.** A substantive appeal may be signed by:

- (a) The claimant personally.
- (b) The accredited representative of a service organization or agent provided a proper power of attorney is filed, or by an attorney provided a proper declaration of representation is filed.
- (c) The guardian or other proper fiduciary of an incompetent claimant, or, if none, by the next of kin or next friend.

2. **TIME LIMIT FOR FILING.** A substantive appeal should be filed within 60 days after the statement of the case is mailed (30 days where 2 or more contesting claimants are involved). The 30-day period applies only where one claim is allowed and another denied, or allowance of one claim would result in a lesser payment to another claimant. An extension of time may be granted for good cause. A substantive appeal postmarked prior to expiration of the applicable period will be accepted as timely filed. (38 U.S.C. 4005(d)(3), 4005A(b)).

3. **FORM OF APPLICATION.** This form should be used for filing a substantive appeal. The benefit sought must be clearly identified. The date of the action appealed should be inserted in item 8. In completing item 10, care should be taken to set out errors of fact or law believed to have been made in the decision -- that is, the reasons for disagreeing with the decision being appealed. Insofar as possible, relate all statements to specific items in the statement of the case. Identify any statement of fact in the statement of the case with which there is disagreement. The claimant will be presumed to be in agreement with facts stated to which no exception is taken. An appeal which is insufficient may be dismissed.

4. **PLACE TO SEND SUBSTANTIVE APPEAL.** The substantive appeal should be mailed to or filed with the Veterans Administration office which entered the decision being appealed.

5. **SUBMISSION OF ADDITIONAL EVIDENCE.** Where a substantive appeal is timely filed, a reasonable time will be granted, if requested, to file additional evidence before final consideration of the appeal. Any additional evidence should be submitted to the Veterans Administration office in which the appeal was filed.

6. **REPRESENTATION.** A claimant may be represented in the presentation of his claim by a recognized service organization or agent provided a proper power of attorney is furnished, or by an attorney provided a proper declaration of representation is furnished. Only one representative is permitted at any one time in the prosecution of a specific claim. A form for filing power of attorney may be obtained from the local Veterans Administration office. (38 CFR 19.129, 19.130, 19.132)

7. **HEARING ON APPEAL (Read carefully).**

a. *Hearing Granted, If Desired, And Conducted Informally.* A hearing will be granted where a claimant or his representative expresses a desire for a personal appearance. The Board operates under Rules of Practice, but its procedures are informal. They are designed to make it easy for a claimant or his representative to present argument or testimony relevant and material to the appellate issue. Strict rules of evidence are not followed. All evidence on file is thoroughly considered regardless of whether a hearing has been held.

IMPORTANT: If a hearing is desired, such request should be made on the face of this form, specifying the place of hearing--Veterans Administration field office or Washington, D.C. (See subparagraph c below.)

b. *Who May Appear.* The claimant, his representative, or both, may be heard. Either may arrange for the voluntary appearance of witnesses to testify.

c. *Place Of Hearing.* A hearing may be held at one of the following places selected by the claimant or his representative:

(1) In Washington, D.C., before a Section of the Board of Veterans Appeals.

(2) In the Veterans Administration field office which originally decided the claim or, if more convenient, any other Veterans Administration field office which has appropriate personnel and technical facilities for conducting a hearing. In that event, the field office personnel act as a hearing agency for the Board of Veterans Appeals but do not decide the appeal.

There is no provision for the Government to bear any expense incurred by the claimant, his counsel or witnesses in connection with attendance at a hearing.

8. **ORDER OF CONSIDERATION.** Appeals are docketed and considered in the order in which they are received, except that for sufficient cause, the Board may advance a case on the

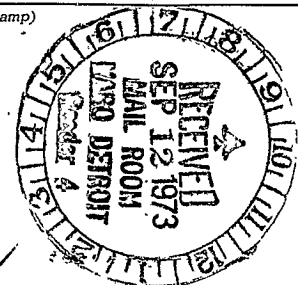
38 U.S.C. 4007

FOR VA USE ONLY

APPEAL RECEIVED (VA Date Stamp)

SEP 12 1973

APPEAL RECORDED (Date)



BOARD OF VETERANS APPEALS

WASHINGTON, D.C. 20420

IN THE APPEAL OF

JAMES W. RORIE
C 25 640-164

FINDINGS AND DECISION

DATE ~~APR~~ 25 1974

DOCKET NO. 73-21 355

THE ISSUE

Entitlement to service connection for chronic cystitis and defective hearing with tinnitus, and to an increased (compensable) evaluation for bilateral pes planus.

REPRESENTATION

Appellant represented by: Disabled American Veterans

WITNESS AT HEARING ON APPEAL

James W.. Rorie, appellant

CONSULTATIONS BY THE BOARD

William T. Bundy, Staff Legal Adviser

RORIE, James W.
C 25 640 164

REMAND

The veteran served on active duty from August 1967 to May 1970. He and his accredited representative contend chronic cystitis and a possible kidney disorder were incurred during this time. The accredited representative points out that service medical records reveal long-standing complaints of backache and urinary tract infection and that chronic cystitis was diagnosed during a recent examination by the Administration.

The veteran was examined for rating purposes in October 1972, at which time a diagnosis of chronic cystitis was given.

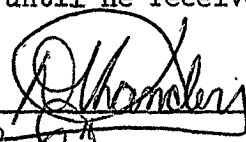
The veteran has service connection for flat feet, rated noncompensably disabling. According to Carl B. Fisher, D.P.M., the veteran had a partial ostectomy on the medial aspect of the left navicular bone subsequent to his most recent examination by the Administration.

After reviewing the entire record, the Board concludes the evidence is not sufficiently developed for final assessment of the merits of the veteran's appeal. Accordingly, the claim is REMANDED for the following: He should be examined by a genitourinary specialist to determine the nature, extent and etiology of any disorder which may be present. He should also be examined by an orthopedic specialist to determine the severity of pes planus. The claims folder should be made available to the attending physicians.

When this development has been completed, the claim should again be reviewed by the originating agency. If the benefit sought by the veteran is not awarded, a supplemental statement of the case should be prepared and he and his representative afforded a reasonable opportunity for response. The claim should then be returned to the Board, with the additional evidence requested, for further appellate consideration.

The purpose of this action is to secure clarifying medical evidence. The Board does not intimate any opinion as to the ultimate determination warranted.

No action is required of the appellant until he receives further notice.


T. H. WELLS, M. D.
I. KLEINFELD
D. T. LANDERS

RECEIVED

1974

ADJUDICATION OFFICE
REGIONAL OFFICE
DETROIT, MICHIGAN

NOTE - SHADED AREAS TO BE COMPLETED BY INPUT ACTIVITY

1. COPY TO <input type="checkbox"/> INS. <input type="checkbox"/> OE FOLDER <input type="checkbox"/> OTHER (Specify)				RATING DECISION				2. FILE NUMBER 25 640 164							
3. TRANS. CODE		4. DATE OF ISSUE 2-25-74		5. DATE OF LAST EXAMINATION		6. DATE OF DEATH		7. INITIALS AND SURNAME OF VETERAN J. W. RORIE							
8. TYPE OF RATING <input checked="" type="checkbox"/> 1. COMPETENT OR NOT AN ISSUE <input type="checkbox"/> 2. INCOMPETENT		9. SEX <input checked="" type="checkbox"/> MALE <input type="checkbox"/> FEMALE		10. BRANCH C		11. ACTIVE DUTY (Mo., day, yr.) EOD 5-30-67 RAD 5-28-70		12. ADDTL. SVC. 1. WT. <input type="checkbox"/> 2. PTE <input type="checkbox"/> 3. SCD <input type="checkbox"/>		13. DATE OF BIRTH (Mo., day, yr.)		14. COMBAT 1. NONE 2. COMP 3. NON COMP 4. BOTH		15. EMPLOYABILITY 1. EMPLOYABLE OR NOT AN ISSUE 2. UNEMPLOYABLE	
16. COMPETENCY 1. COMPETENT OR NOT AN ISSUE 2. INCOMPETENT		17. NO. OF S/C DISAB. (8 through 9) (9 to Show 9 or more)		18. FUTURE DATE CONTROLS PHYSICAL EXAM. MO. YR. REASON 2 79 01 OTHER CONTROL ACT MO. YR. REASON 1. ESTABLISH 2. CANCEL								19. DATE OF THIS RATING 03-26-74			

20. NARRATIVE

J: Scheduled VA examination.

I: Evaluation of service connected pes planus, bilateral; and service connection for chronic cystitis.

F: In compliance with decision of the Board of Veterans Appeals, Washington, D. C., dated January 25, 1974 the veteran was examined by the VA on 2-25-74. Examination of the feet showed depressed longitudinal arches, both right and left. There were no spasms of the foot muscles. There was valgo pes planus, bilateral with moderate pronation of both feet. There were no callouses or warts. There was no swelling of the feet and no atrophy of the foot muscles. The veteran was able to run and walk on the toes and heels. He complained of pain in the right foot when he walked on his toes. The diagnosis was pes planus, third degree, bilateral. Examination of the genitourinary system showed that the bladder was not tender. There was no urethral discharge or lesion. There was history of re-current frequency. The diagnosis was: history of chronic cystitis.

D: A compensable evaluation for pes planus is -being established from the date of examination.

1. SC 38 USC 310(INC VE)
0% from 5-29-70
5276 10% from 2-25-74
PES PLANUS, BIL.

8. NSC VE
5015 OSSEOUS PROTUBERANCE, FEET, BIL.
7512 CHRONIC CYSTITIS

21. SPECIAL PROVISION CODE 1 - PAR. 29 3 - VAR 1321 5 - ANAL. RATING 7 - PAR. 28 2 - PAR. 30 4 - VAR 1322 6 - OTHER OR COMB				22. SPECIAL MONTHLY COMPENSATION A. SMC PAR CODE B. LOSS OF USE C. ANAT. LOSS D. OTHER LOSS				23. OVER SIX	
24. CLAIMANT REPRESENTED BY: <input type="checkbox"/> AL <input checked="" type="checkbox"/> VFW <input checked="" type="checkbox"/> DAV <input type="checkbox"/> ARC <input type="checkbox"/> AMVETS <input type="checkbox"/> OTHER (Specify)				25. RATING BOARD NO. 4 WHZ SK				26. R.O. NO. 29	
27. RATING SPECIALIST (Medical) R. L. RIETH, DO CHM. <input type="checkbox"/>				28. RATING SPECIALIST (Legal-Occupational) W. H. JASNOWSKI CHM. <input type="checkbox"/>				29. RATING SPECIALIST (Legal-Occupational) E. K. BURT CHM. <input checked="" type="checkbox"/>	

copy 27th
10/11/79

IMPORTANT: Read instructions on reverse side before filling in form. Complete all items fully. Send this appeal to the VA office which made the decision being appealed.		VETERANS ADMINISTRATION APPEAL TO BOARD OF VETERANS APPEALS	
1 LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN (Type or print)		2 INSURANCE FILE NO., OR LOAN NO. (If pertinent)	3 CLAIM FILE NO. (Include prefix)
BORIE JAMES WALTER			C-25 640 164
4 IF APPEAL IS BEING MADE BY A PERSON OTHER THAN VETERAN, INDICATE RELATIONSHIP			
<input type="checkbox"/> WIDOW <input type="checkbox"/> CHILD <input type="checkbox"/> MOTHER <input type="checkbox"/> FATHER <input type="checkbox"/> OTHER (Specify)			
5 NAME OF CLAIMANT (If other than veteran)		6 ADDRESS OF CLAIMANT (Number & street, city, State & ZIP Code)	
		3708 C Frew Road Charlotte, N.C. 28206	
7 DATE OF DECISION BEING APPEALED		8 VA OFFICE WHICH MADE DECISION BEING APPEALED (City & State)	
3-14-79		Winston-Salem, N.C.	
REPRESENTATION See Par. 6 of Instructions on reverse side			
HEARING See Par. 7 of Instructions on reverse side.		9A. IS A HEARING DESIRED?	9B. IF YES, SPECIFY PLACE
		<input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	<input type="checkbox"/> FIELD OFFICE <input type="checkbox"/> WASHINGTON, D.C.
10. I TAKE ISSUE WITH THE DECISION CITED ABOVE AND HEREBY PETITION THE BOARD OF VETERANS APPEALS FOR RELIEF AS SET FORTH BELOW (State in specific detail the benefits sought on appeal and your reasons for believing that the action appealed from is erroneous. Follow carefully the instructions in paragraph 3 on the reverse side.)			
<p>I would like to take exception to the decision which denied my request for increased evaluation, in its entirety. I feel that the condition of my feet has worsened greatly over the last couple of years. This problem has caused an exorbitant amount of pain and discomfort, a limitation as to the type of employment I could reasonably seek, and a condition that will persist the rest of my life.</p> <p>I am not questioning the qualification of the Doctor that examined me, I would like to state his examination of my feet was only cursory. At no time during the examination did he touch my feet, have me squat, walk on my heels or toes. However, he did ask as to whether or not I could do these or other things, to which I answered no or with great pain. On the date of my examination there was evidence of blisters and calluses and sores between the toe regions of both feet. Admittedly, some of the blisters had dried up but it was evident where they had been.</p>			
(Attach additional sheets, if necessary)			
11 DATE		12. SIGNATURE OF CLAIMANT (Or representative)	
11-1-79		James W. Borie Jr.	

8/21/77

Dorie &

Identify

Dear Mr. Williams

Thank you for the prompt attention that was afforded my request for increased V.A. disability benefits. However, I do not concur with the decision that was reached and I am giving notice of disagreement so that I may exercise my right to appeal. I am basing this on the present condition of my feet, the opinion of my podiatrist whose care I have been under for several years and the record of file which dates from my tour of duty in Viet Nam to the present.

Sincerely

Dorie W. Dorie

NOTICE OF DISAGREEMENT

RECORDED

IN THE APPEAL OF

JAMES W. RORIE



C 25 640 164

BOARD OF VETERANS APPEALS
WASHINGTON, D.C. 20420

FINDINGS AND DECISION

)
)
)
)
DOCKET NO. 80-01 053

DATE

MAR 27 1980

THE ISSUE

Increased evaluation for bilateral pes planus, currently evaluated as ten per cent (10%) disabling.

REPRESENTATION

Appellant represented by: Disabled American Veterans

CONSULTATIONS BY THE BOARD

J. F. Fussell, Staff Legal Adviser

CONTENTIONS

The veteran and his representative contend that he is entitled to an increased evaluation for his service-connected disorder of bilateral pes planus which has increased in severity since his current evaluation of ten per cent (10%) was assigned. His present symptoms are swollen ankles, frequent loss of balance and agility, constant soreness of the arches and balls of his feet, bilateral eversion and decreased sensitivity to pinprick, and blisters and calluses. In addition it is contended that the examination accorded the veteran by the Veterans Administration was inadequate and that he is presently entitled to an evaluation of thirty per cent (30%).

THE EVIDENCE

The veteran had active service from August 30, 1967, to May 28, 1970. The veteran's claim for an increased evaluation for bilateral pes planus was received March 19, 1979.

In a statement in May 1979 by Dr. C. B. F. it was reported that the veteran complained of chronic pain in both feet. It was observed on physical examination that his peripheral pulses were equal and palpable bilaterally. There were no abnormal neurological signs. A moderate to severe pes "valgo plantus" foot type was observed on ambulation. It was reported that past X-rays had indicated a generalized pronation with osteophytic beaking of the talonavicular joint, most likely due to tarsal joint jamming, secondary to pronation.

On Veterans Administration examination in July 1979 the veteran complained of numbness of the 1st and 2nd toes of both feet, frequent loss of balance and agility, weakness and soreness of the ankles and surrounding areas and swelling of his feet after prolonged periods of standing. It was noted that there was moderate pes planus with eversion bilaterally and a minimal decrease of sensitivity to pinprick over the 1st and 2nd toes bilaterally. X-ray examination disclosed evidence of pes planus. The diagnosis was symptomatic bilateral pes planus.

THE LAW AND REGULATIONS

Disability evaluations are determined by the application of a schedule of ratings which is based on average impairment of earning capacity. (38 U.S.C. 355; 38 C.F.R. Part 4) Separate diagnostic codes identify the various disabilities.

Bilateral pes planus when moderate as evidenced by weight-bearing line over or medial to the great toe, inward bowing of the tendo achillis, pain on manipulation and use of the feet warrants an evaluation of ten per cent; when severe with evidence of marked deformity (pronation, abduction, etc.), pain on manipulation and use accentuated, indications of swelling on use and characteristic callosities, warrants an evaluation of thirty per cent (30%). (Code 5276)

When a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. A reasonable doubt means a substantial doubt and one within the range of probability as distinguished from speculation or remote possibility. (38 C.F.R. 3.102)

DISCUSSION AND EVALUATION

Although it was reported in May 1979 that the veteran had moderate to severe pes "valgo plantus" and that X-ray examination disclosed pronation, a recent Veterans Administration examination failed to disclose on radiographic examination or physical examination any objective evidence of a marked deformity such as pronation or abduction. In addition, there were no findings of accentuated pain on manipulation or use or characteristic callosities. Thus, from the evidence of record, we must conclude that the veteran's current symptoms of bilateral pes planus do not warrant an evaluation in excess of that currently assigned.

As to the contention that the recent examination by the Veterans Administration was inadequate we note that the veteran's complaints were described in detail, clinical examination disclosed minimal decrease of sensitivity to pinprick and that there was a radiographic examination. Thus, we must conclude that the examination accorded the veteran was adequate in all respects.

FINDING OF FACT

The veteran has moderate pes planus with eversion bilaterally and there is no evidence of pronation, abduction or other marked deformities or characteristic callosities.

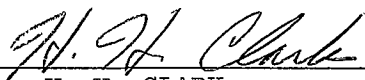
CONCLUSION OF LAW

The current symptoms of bilateral pes planus when evaluated under applicable schedular criteria, do not warrant an evaluation

in excess of that currently assigned. (38 U.S.C. 355; 38 C.F.R. 3.102, Part 4, Code 5276)

DECISION

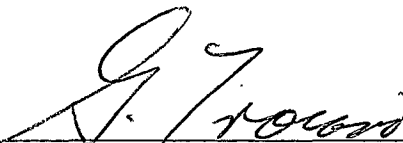
Entitlement to an increased evaluation for bilateral pes planus is not established. The benefit sought on appeal is denied.



H. H. CLARK



G. R. MacDONALD, M.D.



G. TROIANO

DISABLED AMERICAN VETERANS



VARO Rm. 1211-B
941 North Capitol St., N.E.
Washington, D.C. 20421

275-1360 — 275-1361

January 6, 1981

TO: Adjudication Division
372/212B

FROM: John J. Grant
National Service Officer

RE: Rorie, James W.
C# 25 640 164

Ladies/Gentlemen:

The above captioned veteran wishes to file a Notice of Disagreement to your decision of 12-11-80. It is respectfully requested that a Statement of Case be issued.

Respectfully submitted,

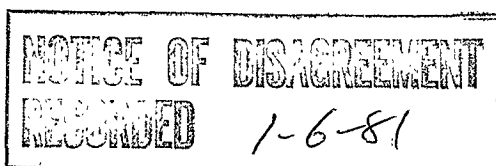

John J. Grant
National Service Officer


JJG:jml

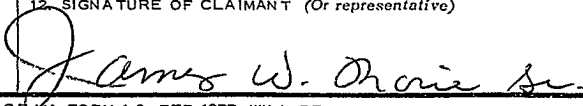
RECEIVED
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JAN 6 1981

Vets. Assn.
VARO, Wash. D. C.




1-13-81

IMPORTANT: Read instructions on reverse side before filling in form. Complete all items fully. Send this appeal to the VA office which made the decision being appealed.		VETERANS ADMINISTRATION APPEAL TO BOARD OF VETERANS APPEALS	
1. LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN (Type or print) RORIE, James W.		2. INSURANCE FILE NO., OR LOAN NO. (If pertinent)	3. CLAIM FILE NO. (Include prefix) 25 640 164
4. IF APPEAL IS BEING MADE BY A PERSON OTHER THAN VETERAN, INDICATE RELATIONSHIP <input type="checkbox"/> WIDOW <input type="checkbox"/> CHILD <input type="checkbox"/> MOTHER <input type="checkbox"/> FATHER <input type="checkbox"/> OTHER (Specify)			
5. NAME OF CLAIMANT (If other than veteran)		6. ADDRESS OF CLAIMANT (Number & street, city, State & ZIP Code) 7109 Mint Place Apt. #203 Alexandria, VA. 22306	
7. DATE OF DECISION BEING APPEALED 12/10/80		8. VA OFFICE WHICH MADE DECISION BEING APPEALED (City & State) Washington, D.C.	
REPRESENTATION See Par. 6 of Instructions on reverse side. D.A.V.			
HEARING See Par. 7 of Instructions on reverse side.		9A. IS A HEARING DESIRED? <input type="checkbox"/> YES <input type="checkbox"/> NO	9B. IF YES, SPECIFY PLACE <input type="checkbox"/> FIELD OFFICE <input type="checkbox"/> WASHINGTON, D.C.
10. I TAKE ISSUE WITH THE DECISION CITED ABOVE AND HEREBY PETITION THE BOARD OF VETERANS APPEALS FOR RELIEF AS SET FORTH BELOW. (State in specific detail the benefits sought on appeal and your reasons for believing that the action appealed from is erroneous. Follow carefully the instructions in paragraph 3 on the reverse side.) <p>I would like an increased evaluation for a service-connected disability for flat feet of at least 30% effective 3/19/79. Several facts were omitted in the "Summary of Evidence" in its referral to the medical statement received from Dr. Carl B. Fisher, Podiatrist. Dr. Fisher also noted that "there appears to be a chronic tinea infection of both feet"...and has been unresponsive to past treatments." Additionally, Dr. Fisher wrote that in his professional opinion of my foot condition observed by him "there is no doubt that this condition is causing Mr. Rorie discomfort, and I would support his request for an increase in V.A. benefits." On 8/21/80, I informed the Podiatrist representing the V.A. that my feet hurt constantly in the metatarsal and arch (not heel) region. The surgery that I mentioned to the doctor was performed on my left foot in 1973 on the medial aspect of the navicular bone and on the bunion. I can not walk on my toes due to the pain it causes and can not walk on my heels due to imbalance. This inability pertains to both the inner and outer borders of the feet. I do not know what is considered to be a normal range in motion and strength however, I do know that the use and strength of my feet has greatly deteriorated severely over the past several years. Prior x-rays by my physicians and the V.A. revealed pronation, now it is being stated by the V.A. that "x-rays of the feet were negative." This implies that according to the x-rays my feet are normal, contrary to the evidence of record.</p> <p>On examination, apparently the degree of disability is where I and the V.A. do not agree. In a March 27, 1980 Board Decision the following was said to be necessary for increased evaluation (copy attached): "when severe with evidence of marked deformity (pronation, abduction, etc.), pain on manipulation and use accentuated, indications of swelling on use and characteristic callosities, warrants an evaluation of thirty per cent (30%). (Code 5276)." "When a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. A reasonable doubt means a substantial doubt and one within the range of probability as distinguished from speculation or remote possibility." (38 C.F.R. 3-102) Webster's dictionary defines marked as - having a noticeable character or trait; distinctive; clearly defined. I have copies of statements by the V.A. saying I have "moderate pronation" and by my physician saying "generalized</p>			
(Attach additional sheets, if necessary)			
11. DATE 3/13/81		12. SIGNATURE OF CLAIMANT (Or representative) 	

IMPORTANT: Read instructions on reverse side before filling in form. Complete all items fully. Send this appeal to the VA office which made the decision being appealed.		VETERANS ADMINISTRATION APPEAL TO BOARD OF VETERANS APPEALS	
1. LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN (Type or print)		2. INSURANCE FILE NO., OR LOAN NO (If pertinent)	3. CLAIM FILE NO (Include prefix)
RORIE, James W.			25 640 164
4. IF APPEAL IS BEING MADE BY A PERSON OTHER THAN VETERAN, INDICATE RELATIONSHIP			
<input type="checkbox"/> WIDOW <input type="checkbox"/> CHILD <input type="checkbox"/> MOTHER <input type="checkbox"/> FATHER <input type="checkbox"/> OTHER (Specify)			
5. NAME OF CLAIMANT (If other than veteran)		6. ADDRESS OF CLAIMANT (Number & street, city, State & ZIP Code)	
		7109 Mint Place Apt. #203 Alexandria, VA. 22306	
7. DATE OF DECISION BEING APPEALED		8. VA OFFICE WHICH MADE DECISION BEING APPEALED (City & State)	
12/10/80		Washington, D.C.	
REPRESENTATION See Par. 6 of Instructions on reverse side. D.A.V.			
HEARING See Par. 7 of Instructions on reverse side.		9A. IS A HEARING DESIRED?	9B. IF YES, SPECIFY PLACE
		<input type="checkbox"/> YES <input type="checkbox"/> NO	<input type="checkbox"/> FIELD OFFICE <input type="checkbox"/> WASHINGTON, D.C.
10. I TAKE ISSUE WITH THE DECISION CITED ABOVE AND HEREBY PETITION THE BOARD OF VETERANS APPEALS FOR RELIEF AS SET FORTH BELOW. (State in specific detail the benefits sought on appeal and your reasons for believing that the action appealed from is erroneous. Follow carefully the instructions in paragraph 3 on the reverse side.)			
<p>pronation." Abduction is apparent and admitted to by both the V.A. and my personal physicans. A statement was made by Dr. Fisher concerning appearance of a chronic tinea infection. Prior military service records, V.A. clinical findings and statements by Doctors Fisher and McClane indicate this foot condition would cause pain, the degree is subjective. Swelling, limited manipulation and use of the feet also is evidenced by a "profile" (limited duty status I received and maintained until discharged from the service), personal and V.A. physicans.</p> <p>In conclusion, it appears that there is a reasonable doubt as to the degree of disability the V.A. has associated with my feet. Therefore, I beseech you to once again consider the evidence as presented by myself, the V.A. and the two private physicans on my behalf.</p>			
(Attach additional sheets, if necessary)			
11. DATE		12. SIGNATURE OF CLAIMANT (Or representative)	
3/13/81		James W. Rorie Sr.	

IN THE APPEAL OF

JAMES W. RORIE



C-25 640 164

BOARD OF VETERANS APPEALS
WASHINGTON, D.C. 20420

FINDINGS AND DECISION

DOCKET NO. 81-22 546

DATE APR 6 1982

THE ISSUE

Entitlement to an increased rating for bilateral pes planus, currently evaluated as ten per cent (10%) disabling.

REPRESENTATION

Appellant represented by: Disabled American Veterans

WITNESS AT HEARING ON APPEAL

James W. Rorie, appellant

CONSULTATIONS BY THE BOARD

Nancy Phillips, Staff Legal Adviser

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CONTENTIONS

It is contended by and on behalf of the veteran, in essence, that the severity of the symptoms of his service-connected bilateral pes planus warrants a higher rating than that which is currently in effect. He contends that a private physician's statement supports his claim. He further contends that private clinical evidence, including service medical records, Veterans Administration clinical findings, and private physician's statements, support an increased rating. He states that X-rays taken at the most recent Veterans Administration examination do not accurately reflect the condition of his feet. Resolution of reasonable doubt in favor of the veteran is requested.

THE EVIDENCE

The veteran's active military service extended from August 1967 to May 1970.

In support of his claim he submitted service records dated January 1970 to the effect that he was considered unfit for return to full duty for a defect described as bilateral pes planus.

In a letter dated May 1979, a podiatrist reported that the veteran's foot condition caused him pain and discomfort. Examination of the feet revealed peripheral pulses equal and palpable bilaterally. No abnormal neurological signs were elicited. A chronic tinea infection of both feet was noted. On ambulation the veteran exhibited moderate to severe pes valgo plantus foot type. Past X-rays indicated a generalized pronated foot.

On Veterans Administration examination in August 1980 the veteran complained that his feet hurt constantly in the metatarsal and heel regions bilaterally. He reported bunion surgery on the left foot in June 1973. Pedal pulses were palpable. The veteran was able to walk on the toes and heels a n d o n the inner and outer borders of the feet. Range of motion of the feet was within normal limits, strength was normal, and no muscle weakness was reported. Maceration and scales between the toes were observed. A medial bulge of the foot

and a depression of the longitudinal arch were reported. X-rays showed no demonstrable evidence of abnormalities. The diagnoses were: (1) Pes planus, (2) tinea pedis, and (3) bunionectomy--operation.

The veteran was afforded a hearing before the Board of Veterans Appeals in February 1982. His testimony was consistent with the contentions outlined above. The representative requested weight-bearing X-ray studies to more accurately reflect the degree of disability.

THE LAW AND REGULATIONS

Disability evaluations are determined by the application of a schedule of ratings which is based on average impairment of earning capacity. (38 U.S.C. 355; 38 C.F.R. Part 4) Separate diagnostic codes identify the various disabilities.

Pes planus, when moderate in degree, with weight-bearing line over or medial to the great toe, inward bowing of the tendo achillis, pain on manipulation and use of the feet, bilateral or unilateral, may be evaluated as ten per cent (10%); where the disability is severe in degree, with objective evidence of marked deformity (pronation, abduction, etc.), pain on manipulation and use accentuated, indication of swelling on use and characteristic callosities, a twenty per cent (20%) evaluation may be assigned where there is unilateral involvement and a thirty per cent (30%) where there is bilateral involvement. (Diagnostic Code 5276)

DISCUSSION AND EVALUATION

The veteran cites past clinical findings and physician's statements in support of his contention that a higher disability evaluation is warranted. However, in evaluating the veteran's present disability the Board must afford the greatest probative weight to current clinical findings. All consideration has been given to a report by Dr. Fisher, a private physician, but the disability rating must be consistent with and supported by the objective findings reported on the most recent Veterans Administration

examination. In this case, the objective findings are essentially normal except for medial bulging of the feet and a depression of the longitudinal arch. Such findings do not reflect severe disablement unilaterally or bilaterally, under the schedular criteria for a higher rating, than that currently in effect.

The Board finds that weight-bearing X-ray studies are not warranted. As may be seen from the schedular criteria outlined above, the condition at issue is not rated on the basis of X-ray findings, whether or not weight bearing.

The Board has considered the doctrine of reasonable doubt, but the evidence is not so evenly balanced as to create such doubt or otherwise warrant allowance of the claim.

FINDINGS OF FACT

1. The veteran's service-connected pes planus is characterized by subjective complaints of constant pain in the metatarsal and arch regions bilaterally, with clinical findings of a medial bulge, depression of the longitudinal arch, normal range of motion of the feet, normal strength, and no muscle weakness.

2. There was no clinical evidence of marked deformity, characteristic callosities, and no indication of swelling on use.

CONCLUSIONS OF LAW

The evidence does not warrant a rating in excess of ten per cent (10%) currently in effect for bilateral pes planus. (38 U.S.C. 355; 38 C.F.R. Part 4, Diagnostic Code 5276)

DECISION

Entitlement to an increased rating for bilateral pes planus, currently rated as ten per cent (10%) disabling, is not warranted. The benefit sought on appeal is denied.


E. W. SEERY


E. H. BAUERSFELD, M.D.


D. BIERMAN