DEPARTMENT OF VETERANS AFFAIRS
Board of Veterans' Appeals
Washington DC 20001

May 28, 2019

In Reply Refer To: O1C2
[redacted]
WILSON, Randolph

Mr. Randolph Wilson
7701 Jim Wells Drive
Corpus Christi, TX 78413

Ruling on Motion

Dear Mr. Wilson:

This letter responds to your Motion for Reconsideration of the Board of Veterans' Appeals (Board) decision of November 27, 2018. The Motion was postmarked by the United States Postal Service on January 26, 2019, and received at the Board on January 31, 2019. I have been delegated the authority to rule on the Motion. *See* 38 C.F.R. § 20.102(a).

A Board decision is final unless the Board's Chairman, or her delegate, orders reconsideration to correct an obvious error in the record. 38 U.S.C. §§ 7103, 7104; 38 C.F.R. §§ 20.1000, 20.1001. Under 38 C.F.R. § 20.1000, the discretion of the Chairman or his delegate to grant reconsideration of an appellate decision is limited to the following grounds: (a) upon allegation of obvious error of fact or law; (b) upon discovery of new and material evidence in the form of relevant records or reports of the service department concerned; or (c) upon allegation that an allowance of benefits by the Board has been materially influenced by false or fraudulent evidence submitted by or on behalf of the appellant. You have alleged, in essence, that the Board decision contains an obvious error of fact or law under 38 C.F.R. § 20.1000(a).

The Chairman, or her delegate, will order reconsideration of an appellate decision upon the ground of "obvious error of fact or law" only when it is shown that the Board committed an error in its decision which, if corrected, would change the outcome of the appeal. Obvious (or clear and unmistakable) error is a very specific and rare kind of error. It is the kind of error of fact or law that, when called to the attention of adjudicators, compels the conclusion, with which reasonable minds could not differ, that the result would have been manifestly different but for the error. Mere allegations that previous adjudicators improperly weighed and evaluated the evidence are inadequate to meet the standard of "obvious error," as are broad allegations of "failure to follow the regulations" or "failure to give due process," or any other general, non-specific claim of "error." *See Fugo v. Brown*, 6 Vet. App. 40, 44 (1993). The alleged error(s) of fact or law must be described with some specificity and persuasive reasons must be given as to why the result would have been manifestly different but for the alleged error. *Id*. Moreover,

reconsideration will not be granted on the basis of an allegation of factual error where there is a *plausible basis* in the record for the factual determinations in the Board decision at issue. This includes situations in which a Board decision reflects the reasonable judgment of one or more of its Veterans Law Judges regarding the credibility, probative value, and weight of the evidence.

The November 27, 2018, Board decision denied entitlement to a compensable disability rating for bilateral hearing loss.

In your Motion for Reconsideration, you contend that the Board erred by denying your claim. You asserted that you have a current disability rating of 10 percent for tinnitus and are being re-evaluated for your hearing loss. I have reviewed your Motion, the Board's decision, and the record.

The Board explained in its November 27, 2018 decision that pursuant to the schedular rating criteria under 38 C.F.R. § 4.85, Diagnostic Code 6100, your hearing loss manifested at a Level I and did not result in a compensable disability rating. The Board's decision was based upon a May 2016 VA examination. I find that based upon the preponderance of the overall evidence of record, the Board's finding was proper.

Your Motion for Reconsideration, which has been carefully reviewed in light of the Board's decision in this appeal, does not demonstrate that the Board decision contains obvious error of fact or law. The Board decision at issue contains findings of fact that are supported by plausible reasons and bases. For these reasons, your Motion for Reconsideration is denied.

If you would like to file a new claim, or a claim to reopen, you may submit that claim and any pertinent evidence to your local VA regional office.

I note that you submitted private medical records from a December 8, 2018 audiological examination.

The additional evidence submitted with your Motion will be forwarded to the Agency of Original Jurisdiction for appropriate action. The additional evidence does not establish a basis for reconsideration of the Board's November 27, 2018 decision because the private audiological examination was not in your VA file prior to the Board's decision.

3.

WILSON, Randolph

[redacted]

The additional evidence submitted with your Motion will be forwarded to the Agency of Original Jurisdiction for appropriate action.

I hope this information is helpful to you.

Sincerely yours,

K. Osborne
Deputy Vice Chairman
Board of Veterans' Appeals

Enclosure:
Your Appellate Rights Relating to Our Denial of Your Motion for Reconsideration.

cc: Texas Veterans Commission
cc: VA Regional Office Anchorage Alaska

YOUR APPELLATE RIGHTS RELATING TO OUR DENIAL OF YOUR MOTION FOR RECONSIDERATION

The attached letter informs you that the Board of Veterans' Appeals (BVA or Board) has denied your motion for reconsideration of one or more of its decisions. If you are satisfied with the outcome, you do not need to do anything. However, if you are not satisfied with the outcome, you have the following options:

- Appeal the Board decision that you asked the Board to reconsider to the United States Court of Appeals for Veterans Claims (Court)

- Appeal the denial of your motion for reconsideration of that Board decision to the Court, but only under certain circumstances.

How long do I have to start my appeal of the Board decision to the Court? You have **120 days** from the date the Board decision was mailed to you (as shown on the first page of the decision) to file a Notice of Appeal with the Court. However, if you filed your motion for reconsideration within this 120-day period, you now have an additional 120 days from the date of mailing of the enclosed letter denying that motion within which to file a Notice of Appeal with the Court. *Rosler v. Derwinski*, 1 Vet. App. 241 (1991). If you filed more than one motion for reconsideration of that same Board decision, you have an additional 120 days from the date of mailing of the enclosed letter ***only if*** the Board received each of your motions within 120 days after it mailed its decision or its denial of the prior reconsideration motion. *Murillo v. Brown*, 10 Vet. App. 108 (1997). It is your responsibility to make sure that your appeal to the Court is filed on time. Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

How do I appeal to the United States Court of Appeals for Veterans Claims? Send your Notice of Appeal to the Court at:

Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: http://www.uscourts.cavc.gov, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office.

Under what circumstances may I appeal the denial of my motion for reconsideration to the Court? You may appeal the Board's denial of your motion for reconsideration to the Court ***only*** if you filed a timely appeal of the Board decision that you asked the Board to reconsider. *Engelke v. Gober*, 10 Vet. App. 396 (1997).

Remember, you must file your Notice of Appeal within 120 days of the date of mailing of the enclosed letter. Send your Notice of Appeal to the address above for the Court.

Can someone represent me in my appeal to the Court? If you want someone to represent you before the Court, rather than before the VA, you can get information on how to do so at the Court's website at: http://www.uscourts.cavc.gov. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: http://www.vetsprobono.org, mail@vetsprobono.org, or (855) 446-9678.

BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

IN THE APPEAL OF [redacted]
RANDOLPH WILSON Docket No. 16-37 242
REPRESENTED BY
Texas Veterans Commission

DATE: November 27, 2018

ORDER

Entitlement to an increased rating for hearing loss, currently rated at 0 percent disabling, is denied.

REMANDED

Entitlement to service connection for lung disease, to include as due to exposure to aircraft fumes, is remanded.

FINDING OF FACT

For the entire appeal period, there was no worse than Level I hearing in each ear.

CONCLUSION OF LAW

The criteria for increased rating for hearing loss are not met. 38 U.S.C. § 1155; 38 C.F.R. §§ 3.102, 3.321, 4.1-4.10, 4.85.

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran served on active duty in the Air Force from July 1969 to July 1970.

This matter of entitlement to an increased rating for hearing loss comes before the Board of Veterans' Appeals (Board) on appeal from a June 2016 rating decision of a Department of Veterans Affairs (VA) Regional Office (RO).

Increased rating for hearing loss is denied.

Disability ratings are determined by applying the criteria set forth in the VA Schedule for Rating Disabilities, found in 38 C.F.R., Part 4. The Rating Schedule is primarily a guide in the evaluation of disability resulting from all types of diseases and injuries encountered as a result of or incident to service. The ratings are intended to compensate, as far as can practicably be determined, the average impairment of earning capacity resulting from such diseases and injuries and their residual conditions in civilian occupations. 38 U.S.C. § 1155; 38 C.F.R. § 4.1.

When there is a question as to which of two evaluations shall be applied, the higher evaluation will be assigned if the disability picture more nearly approximates the criteria for that rating. Otherwise, the lower rating will be assigned. 38 C.F.R. § 4.3.

The Veteran's service-connected bilateral hearing loss is currently assigned a noncompensable rating under 38 C.F.R. § 4.85, Diagnostic Code 6100.

Ratings of hearing loss range from noncompensable to 100 percent based on organic impairment of hearing acuity as measured by the results of speech discrimination tests combined with the average hearing threshold levels as measured by pure tone audiometry tests in the frequencies 1000, 2000, 3000, and 4000 cycles per second. To rate the degree of disability for service-connected hearing loss, the Rating Schedule has established eleven auditory acuity levels, designated from Level I, for essentially normal acuity, through Level XI, for profound deafness. 38 C.F.R. § 4.85(h), Table VI. To establish entitlement to a compensable rating for hearing loss, it must be shown that certain minimum levels of the combination of the percentage of speech discrimination loss and average

pure tone decibel loss are met. The assignment of disability ratings for hearing impairment is derived by a mechanical application of the Rating Schedule to the numeric designations assigned after audiometric evaluations are rendered. *Lendenmann v. Principi*, 3 Vet. App. 345, 349 (1992).

The criteria for rating hearing impairment uses controlled speech discrimination tests (Maryland CNC) together with the results of pure tone audiometry tests. These results are then charted on Table VI, Table VIA in exceptional cases as described in 38 C.F.R. §4.86, and Table VII, as set out in the Rating Schedule. 38 C.F.R. § 4.85. An exceptional pattern of hearing loss occurs when the pure tone threshold at 1000, 2000, 3000, and 4000 Hertz is 55 decibels or more, or when the pure tone threshold is 30 decibels or more at 1000 Hertz and 70 decibels or more at 2000 Hertz. 38 C.F.R. § 4.86.

The Veteran is currently rated at 0 percent for hearing loss. The Veteran contends that his bilateral hearing loss warrants a compensable disability rating.

A VA examination for hearing loss was conducted in May 2016. This is also the most recent hearing evaluation in the file. The pure tone thresholds, in decibels, were as follows.

Hertz	Right Ear Threshold	Left Ear Threshold
1000	20	20
2000	35	30
3000	40	35
4000	45	50
Average	35	33.75

Word recognition testing showed speech recognition ability of 100 percent bilaterally. The audiometry results equate to Level I hearing of each ear using

Table VI. 38 C.F.R. § 4.85. Applying the percentage ratings for hearing impairment found in Table VII, such findings result in a noncompensable disability rating. 38 C.F.R. § 4.85.

The Board further finds that the evidence of record reflects no certification of language difficulties, inconsistent speech audiometry scores, or pure tone threshold findings of 30 decibels or less at 1000 Hertz and 70 decibels or more at 2000 Hertz, or pure tone thresholds of 55 decibels or more from 1000 to 4000 Hertz as to warrant consideration as an exceptional pattern of hearing impairment. 38 C.F.R. §4.86.

To the extent that the Veteran contends that his hearing loss is more severe than currently evaluated, the Board observes that the schedular criteria would contemplate most symptoms as indicated by the provisions of 38 C.F.R. § 4.86.

The Board has also considered the applicability of the benefit of the doubt doctrine. However, the preponderance of the evidence is against the Veteran's claim for a compensable rating for bilateral hearing loss. Therefore, the benefit of the doubt doctrine is not applicable in the instant appeal and the claim for a compensable disability rating for hearing loss must be denied. 38 U.S.C. § 1507; 38 C.F.R. §§ 4.3, 4.7.

REASONS FOR REMAND

Entitlement to service connection for lung disease, to include asbestosis, is remanded.

The matter of service connection for lung disease comes before the Board on appeal from an October 2014 rating decision of a VA Regional Office.

The Veteran alleges that his current lung condition, most recently diagnosed as asbestosis with COPD, is connected to his active duty service. The Veteran has specifically asserted that fumes from aircraft are the cause of his lung condition.

A VA exam was conducted in May 2016. The examiner evaluated whether or not the Veteran's current lung condition of asbestosis with COPD was caused by exposure to fumes from aircraft. The examiner responded that the condition was less likely than not service-connected and provided the following rationale:

> "review of the medical records at the current time does not show evidence of exposure to fumes from B-52. Several medical records from the claimant's time in service was reviewed, the claimant was seen for issue with his hand, sinusitis, and headaches among other complaints. However, there were no medical records from the claimant's time in service that showed that he ever complained of being sick from exposure to fumes."

This opinion does not address whether the Veteran's *current* lung condition is connected to service but instead focuses on the nonexistence of symptomatology while in service. An explanation as to why the Veteran's current lung condition is or is not connected to service needs to be provided.

The matter is REMANDED for the following action:

1. Identify and obtain any pertinent, outstanding VA and private treatment records and associate them with the claims file.

2. Forward the Veteran's claims file to an appropriate examiner to provide an opinion on the Veteran's claim of exposure to aircraft fumes causing his current lung condition. The need for another examination is left to the discretion of the medical professional providing the opinion.

The examiner should respond to the following:

a) Provide an opinion as to whether it is at least as likely as not (50 percent or greater probability) that the Veteran's lung condition is etiologically related to, or had its onset during active service.

Review of the entire file is required, but attention is directed to the Veteran's claims of exposure to aircraft fumes in January 2014 Correspondence and in statement provided with January 2015 notice of disagreement.

A complete rationale for the opinion should be provided.

L. M. BARNARD
Veterans Law Judge
Board of Veterans' Appeals

J. Jack, Law Clerk

Department of Veterans Affairs

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (Board) is the final decision for all issues addressed in the "Order" section of the decision. The Board may also choose to remand an issue or issues to the local VA office for additional development. If the Board did this in your case, then a "Remand" section follows the "Order." However, you cannot appeal an issue remanded to the local VA office because a remand is not a final decision. *The advice below on how to appeal a claim applies only to issues that were allowed, denied, or dismissed in the "Order."*

If you are satisfied with the outcome of your appeal, you do not need to do anything. Your local VA office will implement the Board's decision. However, if you are not satisfied with the Board's decision on any or all of the issues allowed, denied, or dismissed, you have the following options, which are listed in no particular order of importance:

- Appeal to the United States Court of Appeals for Veterans Claims (Court)
- File with the Board a motion for reconsideration of this decision
- File with the Board a motion to vacate this decision
- File with the Board a motion for revision of this decision based on clear and unmistakable error.

Although it would not affect this BVA decision, you may choose to also:

- Reopen your claim at the local VA office by submitting new and material evidence.

There is *no* time limit for filing a motion for reconsideration, a motion to vacate, or a motion for revision based on clear and unmistakable error with the Board, or a claim to reopen at the local VA office. Please note that if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your appeal at the Court because of jurisdictional conflicts. If you file a Notice of Appeal with the Court ***before*** you file a motion with the Board, the Board will not be able to consider your motion without the Court's permission or until your appeal at the Court is resolved.

How long do I have to start my appeal to the court? You have **120 days** from the date this decision was mailed to you (as shown on the first page of this decision) to file a Notice of Appeal with the Court. If you also want to file a motion for reconsideration or a motion to vacate, you will still have time to appeal to the court. *As long as you file your motion(s) with the Board within 120 days of the date this decision was mailed to you,* you will have another 120 days from the date the Board decides the motion for reconsideration or the motion to vacate to appeal to the Court. You should know that even if you have a representative, as discussed below, *it is your responsibility to make sure that your appeal to the Court is filed on time*. Please note that the 120-day time limit to file a Notice of Appeal with the Court does not include a period of active duty. If your active military service materially affects your ability to file a Notice of Appeal (e.g., due to a combat deployment), you may also be entitled to an additional 90 days after active duty service terminates before the 120-day appeal period (or remainder of the appeal period) begins to run.

How do I appeal to the United States Court of Appeals for Veterans Claims? Send your Notice of Appeal to the Court at:

Clerk, U.S. Court of Appeals for Veterans Claims
625 Indiana Avenue, NW, Suite 900
Washington, DC 20004-2950

You can get information about the Notice of Appeal, the procedure for filing a Notice of Appeal, the filing fee (or a motion to waive the filing fee if payment would cause financial hardship), and other matters covered by the Court's rules directly from the Court. You can also get this information from the Court's website on the Internet at: http://www.uscourts.cavc.gov, and you can download forms directly from that website. The Court's facsimile number is (202) 501-5848.

To ensure full protection of your right of appeal to the Court, you must file your Notice of Appeal **with the Court**, not with the Board, or any other VA office.

How do I file a motion for reconsideration? You can file a motion asking the Board to reconsider any part of this decision by writing a letter to the Board clearly explaining why you believe that the Board committed an obvious error of fact or law, or stating that new and material military service records have been discovered that apply to your appeal. It is important that your letter be as specific as possible. A general statement of dissatisfaction with the Board decision or some other aspect of the VA claims adjudication process will not suffice. If the Board has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Issues not clearly identified will not be considered. Send your letter to:

Litigation Support Branch
Board of Veterans' Appeals
P.O. Box 27063
Washington, DC 20038

CONTINUED ON NEXT PAGE

Remember, the Board places no time limit on filing a motion for reconsideration, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to vacate? You can file a motion asking the Board to vacate any part of this decision by writing a letter to the Board stating why you believe you were denied due process of law during your appeal. *See* 38 C.F.R. 20.904. For example, you were denied your right to representation through action or inaction by VA personnel, you were not provided a Statement of the Case or Supplemental Statement of the Case, or you did not get a personal hearing that you requested. You can also file a motion to vacate any part of this decision on the basis that the Board allowed benefits based on false or fraudulent evidence. Send this motion to the address on the previous page for the Litigation Support Branch, at the Board. Remember, the Board places no time limit on filing a motion to vacate, and you can do this at any time. However, if you also plan to appeal this decision to the Court, you must file your motion within 120 days from the date of this decision.

How do I file a motion to revise the Board's decision on the basis of clear and unmistakable error? You can file a motion asking that the Board revise this decision if you believe that the decision is based on "clear and unmistakable error" (CUE). Send this motion to the address on the previous page for the Litigation Support Branch, at the Board. You should be careful when preparing such a motion because it must meet specific requirements, and the Board will not review a final decision on this basis more than once. You should carefully review the Board's Rules of Practice on CUE, 38 C.F.R. 20.1400-20.1411, and *seek help from a qualified representative before filing such a motion.* See discussion on representation below. Remember, the Board places no time limit on filing a CUE review motion, and you can do this at any time.

How do I reopen my claim? You can ask your local VA office to reopen your claim by simply sending them a statement indicating that you want to reopen your claim. However, to be successful in reopening your claim, you must submit new and material evidence to that office. *See* 38 C.F.R. 3.156(a).

Can someone represent me in my appeal? Yes. You can always represent yourself in any claim before VA, including the Board, but you can also appoint someone to represent you. An accredited representative of a recognized service organization may represent you free of charge. VA approves these organizations to help veterans, service members, and dependents prepare their claims and present them to VA. An accredited representative works for the service organization and knows how to prepare and present claims. You can find a listing of these organizations on the Internet at: http://www.va.gov/vso/. You can also choose to be represented by a private attorney or by an "agent." (An agent is a person who is not a lawyer, but is specially accredited by VA.)

If you want someone to represent you before the Court, rather than before the VA, you can get information on how to do so at the Court's website at: http://www.uscourts.cavc.gov. The Court's website provides a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to the represent appellants. You may also request this information by writing directly to the Court. Information about free representation through the Veterans Consortium Pro Bono Program is also available at the Court's website, or at: http://www.vetsprobono.org, mail@vetsprobono.org, or (855) 446-9678.

Do I have to pay an attorney or agent to represent me? An attorney or agent may charge a fee to represent you after a notice of disagreement has been filed with respect to your case, provided that the notice of disagreement was filed on or after June 20, 2007. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636. If the notice of disagreement was filed before June 20, 2007, an attorney or accredited agent may charge fees for services, but only after the Board first issues a final decision in the case, and only if the agent or attorney is hired within one year of the Board's decision. *See* 38 C.F.R. 14.636(c)(2).

The notice of disagreement limitation does not apply to fees charged, allowed, or paid for services provided with respect to proceedings before a court. VA cannot pay the fees of your attorney or agent, with the exception of payment of fees out of past-due benefits awarded to you on the basis of your claim when provided for in a fee agreement.

Fee for VA home and small business loan cases: An attorney or agent may charge you a reasonable fee for services involving a VA home loan or small business loan. *See* 38 U.S.C. 5904; 38 C.F.R. 14.636(d).

Filing of Fee Agreements: If you hire an attorney or agent to represent you, a copy of any fee agreement must be sent to VA. The fee agreement must clearly specify if VA is to pay the attorney or agent directly out of past-due benefits. See 38 C.F.R. 14.636(g)(2). If the fee agreement provides for the direct payment of fees out of past-due benefits, a copy of the direct-pay fee agreement must be filed with the agency of original jurisdiction within 30 days of its execution. A copy of any fee agreement that is not a direct-pay fee agreement must be filed with the Office of the General Counsel within 30 days of its execution by mailing the copy to the following address: Office of the General Counsel (022D), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. See 38 C.F.R. 14.636(g)(3).

The Office of the General Counsel may decide, on its own, to review a fee agreement or expenses charged by your agent or attorney for reasonableness. You can also file a motion requesting such review to the address above for the Office of the General Counsel. See 38 C.F.R. 14.636(i); 14.637(d).