



BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: September 12, 2018

JOSEPH A. MANNINO

Dear Appellant:

The Board of Veterans' Appeals (Board) has made a decision in your appeal, and a copy is enclosed.

<i>If your decision contains a</i>	<i>What happens next</i>
Grant	The Department of Veterans Affairs (VA) will be contacting you regarding the next steps, which may include issuing payment. Please refer to VA Form 4597, which is attached to this decision, for additional options.
Remand	Additional development is needed. VA will be contacting you regarding the next steps.
Denial or Dismissal	Please refer to VA Form 4597, which is attached to this decision, for your options.

If you have any questions, please contact your representative, if you have one, or check the status of your appeal at <http://www.vets.gov>.

Sincerely yours,

K. Osborne
Deputy Vice Chairman
Enclosures (1)
CC: The American Legion



BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

IN THE APPEAL OF
JOSEPH A. MANNINO
REPRESENTED BY
The American Legion

[REDACTED]
Docket No. 17-47 915
Advanced on the Docket

DATE: September 12, 2018

ORDER

Entitlement to special monthly compensation (SMC) based on the need for regular aid and attendance of another person is granted.

FINDINGS OF FACT

1. The Veteran is service-connected for the following disabilities: posttraumatic stress disorder (PTSD), rated 70 percent disabling; tinnitus, rated 10 percent disabling; and bilateral hearing loss, rated at 10 percent disabling. His combined disability rating is 80 percent and he is in receipt of a total disability rating based on individual unemployability (TDIU) due to service-connected disabilities.
2. The evidence is at least evenly balanced as to whether the Veteran requires assistance in accomplishing the activities of daily living and is unable to protect himself from the hazards and dangers of his daily environment on account of his service-connected disabilities.

CONCLUSION OF LAW

With reasonable doubt resolved in favor of the Veteran, the criteria for SMC based on the need for regular aid and attendance of another person are met. 38 U.S.C. §§ 1114(l), 5107 (2012); 38 C.F.R. §§ 3.102, 3.350(b), 3.352(a) (2018).

REASONS AND BASES FOR FINDINGS AND CONCLUSION

The Veteran served on active duty from October 1944 to January 1946. Service personnel records reflect the Veteran received numerous citations and awards, including the Purple Heart.

1. Entitlement to SMC based on the regular need for the aid and attendance of another person or by reason of being housebound.

SMC at the aid and attendance rate is payable when a veteran, due to service-connected disability, has suffered the anatomical loss or loss of use of both feet or one hand and one foot, or is blind in both eyes, or is permanently bedridden or so helpless as to be in need of regular aid and attendance. *See* 38 U.S.C. § 1114(l); 38 C.F.R. § 3.350(b).

Pursuant to 38 C.F.R. § 3.350(b)(3) and (4), the criteria for determining that a veteran is so helpless as to be in need of regular aid and attendance, including a determination that he is permanently bedridden, are contained in 38 C.F.R. § 3.352(a). That regulation provides that the following will be accorded consideration in determining the need for regular aid and attendance: inability of a claimant to dress or undress himself, or to keep himself ordinarily clean and presentable; frequent need of adjustment of any special prosthetic or orthopedic appliances which by reason of the particular disability cannot be done without aid; inability to feed himself through the loss of coordination of upper extremities or through extreme weakness; inability to attend to the wants of nature; or incapacity, physical or mental, which requires care or assistance on a regular basis to protect him from hazards or dangers incident to his daily environment.

“Bedridden” is defined as that condition, which, through its essential character, actually requires that a claimant remain in bed. The fact that a claimant has

voluntarily taken to bed or that a physician has prescribed rest in bed for the greater or lesser part of the day to promote convalescence or cure will not suffice.

It is not required that all of the above disabling conditions be found to exist before a favorable rating may be made. The particular personal functions that a veteran is unable to perform should be considered in connection with his condition as a whole. It is only necessary that the evidence establish that a veteran is so helpless as to need regular aid and attendance, not that there is a constant need.

Determinations that a veteran is so helpless as to be in need of regular aid and attendance will not be based solely upon an opinion that his condition is such as would require him to be in bed. They must be based on the actual requirement of personal assistance from others. *See* 38 C.F.R. § 3.352(a).

As noted above, the Veteran is service-connected for the following disabilities: PTSD, rated 70 percent disabling; tinnitus, rated 10 percent disabling; and bilateral hearing loss, rated at 10 percent disabling. His combined disability rating is 80 percent and he is in receipt of a total disability rating based on individual unemployability (TDIU) due to service-connected disabilities.

An October 2014 “Examination for Housebound Status or Permanent Need for Regular Aid and Attendance” form (VA Form 21-2680) completed by a physician, diagnosed the Veteran with debility. It was noted that dysphagia, urinary retention, atrial fibrillation, hypertension and cataracts restrict the Veteran’s activities and functions. The Board notes that the Veteran is not service-connected for these disabilities. The physician did not address the effect of the Veteran’s service-connected disabilities.

The Veteran submitted an August 2017 Aid and Attendance examination. The Veteran was noted to be 95 years old. The disabilities noted to restrict his activities and functions were listed as severe osteoarthritis of his hips and knee (non-service-connected) and his service-connected tinnitus. The examiner indicated that the Veteran is confined to bed between 9pm and 9 am and from 9 am to 9 pm. It was noted that the Veteran is homebound and leaves home for urgent medical care only. It was noted that the Veteran ambulates with a walker and requires assistance from his spouse at all times. In an October 2017 addendum, it was noted that the Veteran is hypervigilant and easily startles and needs

supervision constantly. In addition, it was noted that the Veteran is very hard of hearing which makes caring for him difficult. In a subsequent November 2017 addendum, the reviewing physician stated that the Veteran was 70 percent service-connected for his PTSD and as a result requires 24-hour supervision.


The Board acknowledges, at the outset, that the Veteran has not suffered the anatomical loss or loss of use of both feet or one hand and one foot and is not service-connected for blindness in both eyes. Although there are nonservice-connected disabilities that contribute to his functional impairments and his need for assistance (e.g., severe osteoarthritis of the hips and knees), the Board finds that the evidence is at least in relative equipoise as to whether the Veteran's service-connected PTSD, tinnitus, and bilateral hearing loss disabilities, when considered alone, are of sufficient severity to require the need for assistance with his activities of daily living. The August 2017 Aid and Attendance examination with October 2017 and November 2017 addendums and letters from his wife suggest that his activities of daily living are limited by his service-connected disabilities, among other problems.

In sum, after considering the competent, credible, and probative lay and medical evidence of record, the Board finds that, collectively, such evidence is approximately evenly balanced on the question of whether the Veteran is so helpless as to be in need of regular aid and attendance of another person because of the manifestations of his service-connected PTSD, tinnitus and bilateral hearing loss disabilities. The reasonable doubt created by this relative equipoise in the evidence must be resolved in favor of the Veteran. Hence, the criteria for SMC based on the regular need for the aid and attendance of another person are met.

SMC based on housebound status is a lesser benefit than SMC at the aid and attendance rate. *See* 38 U.S.C. § 1114(l), (s); 38 C.F.R. § 3.350(i). Hence, the grant of SMC at the aid and attendance rate renders the housebound issue moot.

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IN THE APPEAL OF
JOSEPH A. MANNINO


Docket No. 17-47 915



CAROLINE B. FLEMING
Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD

A.M. Clark, Counsel

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**

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).