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

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| DOROTHY C. FOGG, | ) | |
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| Appellant | ) | |
| | ) | |
| v. | ) | Vet. App. No. 18-6976 |
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| ROBERT L. WILKIE, | ) | |
| Secretary of Veterans Affairs, | ) | |
| | ) | |
| Appellee. | ) | |

**APPELLANT'S OPPOSITION TO APPELLEE'S SEPTEMBER 9, 2019 MOTION TO STRIKE REFERENCES TO FACTS IN APPELLANT'S BRIEF**

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In Mrs. Fogg's brief, she cites the fact that post-traumatic stress disorder (PTSD) was first introduced in the third edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM–III) published in 1980, and requested judicial notice of this fact. *See* Appellant's Brief at 3 n.1. The Secretary concedes that "it may be appropriate for the Court to take judicial notice of the date PTSD was added to the DSM." Motion to Strike ("Mot") at 4. Mrs. Fogg maintains that the Court should take judicial notice of this fact. Despite the Secretary's concession, he seeks to strike this judicially noticeable fact by moving to strike "footnote[] one" in its entirety. Mot. at 7. Mrs. Fogg opposes the Secretary's Motion on this narrow basis and requests judicial notice of the date PTSD was added to the DSM–III.

The Court may take judicial notice of the fact that PTSD was first introduced in the DSM–III in 1980 because it is "not subject to reasonable dispute." *Procopio v. Shinseki*, 26 Vet. App. 76, 76 n.1 (2012). This Court has itself recognized and relied on this same fact in its decisions. *Cogburn v. Shinseki*, 24 Vet. App. 205, 214 (2010) ("[I]t is important

to note that post-traumatic stress disorder was not recognized as a diagnosis by the American Psychiatric Association until January 1980." (citing DSM–III)). So, too, have other appeals courts. *See, e.g.*, *United States v. Rodriguez*, 581 F.3d 775, 808 n.14 (8th Cir. 2009) (noting that the DSM "did not adopt PTSD into its nosology until the third edition of the manual, published in 1980"); *Mitchell v. Kemp*, 827 F.2d 1433, 1434 n.3 (11th Cir. 1987) (noting that "the mental health profession adopted" PTSD as a "label" in 1980).

In the Secretary's words, the date PTSD was first introduced is "of th[e] type" appropriate for judicial notice. Mot. at 4 (arguing that certain facts are "not of th[e] type" appropriate for judicial notice "[a]side from the date that PTSD was added to the DSM–III"). For this reason, the Board of Veterans Appeals has repeatedly taken judicial notice of this precise fact, and the Secretary has not offered any contrary authority. *See, e.g.*, No. 0421123, 2004 WL 3296516, at *6 (Bd. Vet. App. Aug. 3, 2004) ("The Board also takes judicial notice of the fact that organized psychiatry first recognized PTSD as a disorder in 1980." (citing DSM–III)); No. 0639859, 2006 WL 4444798, at *4 (Bd. Vet. App. Dec. 27, 2006) ("[T]he Board takes judicial notice of the fact that PTSD was not an official diagnosis until 1980.").[1]

Mrs. Fogg respectfully requests that this Court take judicial notice of the fact that PTSD was first introduced in the DSM–III in 1980, and deny the Secretary's Motion to strike this fact from her brief.

[1] Under 38 C.F.R. § 20.1301, Board decisions are issued without titles, as personal identifiers are redacted. Pursuant to U.S. Vet. App. Rule 30(a), copies of these Board decisions are attached as Exhibits A-B.

DATED: October 23, 2019

Respectfully submitted,

By: /s/ *Matthew Q. Verdin*

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# EXHIBIT A

Bd. Vet. App. 0421123, 2004 WL 3296516

Board of Veterans Appeals

Department of Veterans' Affairs

[TITLE REDACTED BY AGENCY]

02-17 938A
Decision Date: 08/03/04
Archive Date: 08/09/04

***1** On appeal from the Department of Veterans Affairs Regional Office in Cleveland, Ohio

THE ISSUE

Entitlement to an effective date earlier than September 6, 2000, for a grant of entitlement to service connection for post-traumatic stress disorder (PTSD).

WITNESS AT

HEARING ON APPEAL

Veteran

**REPRESENTATION**

James A. Frost, Counsel

**INTRODUCTION**

The veteran served on active duty from November 1942 to February 1946.

This appeal to the Board of Veterans' Appeals (Board) arises from a rating decision in March 2001 by the Cleveland, Ohio, Regional Office (RO) of the Department of Veterans Affairs (VA).

**FINDINGS OF FACT**

1. VA provided the veteran adequate notice and assistance with regard to his claim.

2. A claim of entitlement to service connection for PTSD was not raised prior to September 6, 2000, and entitlement to that benefit was not shown until subsequent to September 6, 2000.

**CONCLUSION OF LAW**

Entitlement to an effective date earlier than September 6, 2000, for a grant of entitlement to service connection for PTSD is not warranted. 38 U.S.C.A. § 5110 (West 2002); 38 C.F.R. § 3.400 (2003).

  

## REASONS AND BASES FOR FINDINGS AND CONCLUSION

I. VA's Duties to Notify and Assist

The Veterans Claims Assistance Act of 2000 (VCAA), codified at 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5106, 5107, 5126 (West 2002), and its implementing regulations, codified at 38 C.F.R. §§ 3.102, 3.156(a), 3.159, and 3.326(a) (2003), are applicable to this appeal. The VCAA and the implementing regulations provide that VA will assist a claimant in obtaining evidence necessary to substantiate a claim but is not required to provide assistance to a claimant if there is no reasonable possibility that such assistance would aid in substantiating the claim. They also require VA to notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of the notice, VA is to specifically inform the claimant and the claimant's representative, if any, of which portion, if any, of the evidence is to be provided by the claimant and which part, if any, VA will attempt to obtain on behalf of the claimant.

The United States Court of Appeals for Veterans Claims (Court) has mandated that VA ensure strict compliance with the provisions of the VCAA. See Quartuccio v. Principi, 16 Vet. App. 183 (2002).

A. Duty to Notify

Relevant to the duty to notify, the Court has indicated that notice under the VCAA must be given prior to an initial unfavorable decision by the agency of original jurisdiction. See Pelegrini v. Principi, No. 01-944 (U.S.Vet.App. June 24, 2004) (Pelegrini II). In Pelegrini II, slip op. at 11, the Court held that the VCAA requires VA to provide notice, consistent with the requirements of 38 U.S.C.A. § 5103(A), 38 C.F.R. § 3.159(b), and Quartuccio, that informs the claimant of any information and evidence not of record (1) that is necessary to substantiate the claim, (2) that VA will seek to provide, and (3) that the claimant is expected to provide and that, furthermore, in what can be considered a fourth element of the requisite notice, VA must 'also request that the claimant provide any evidence in the claimant's possession that pertains to the claim', under 38 C.F.R. § 3.159(b). In Pelegrini II, the Court clarified that VA's regulations implementing amended section 5103(a) apply to cases pending before VA on November 9, 2000, even if the RO decision was issued before that date and that, where notice was not mandated at the time of the initial RO decision, it was not error to provide remedial notice after such initial decision. See slip op. at 3, 7-10.

***2** In the veteran's case, the rating decision in March 2001 granted service connection for PTSD. Prior to the rating action in March 2001, the RO sent the veteran a notice letter in October 2000 concerning the criteria governing the reopening of his service connection claim. After the veteran was notified in April 2001 of the RO's decision on his claim, he filed a notice of disagreement in June 2001 with the effective date of the grant of service connection for PTSD.

VA's General Counsel considered the question of whether VA must notify a claimant of the information and evidence necessary to substantiate an issue first raised in a notice of disagreement submitted in response to VA's notice of its decision on a claim for which VA has already notified the claimant of the information and evidence necessary to substantiate the claim. VAOPGCPREC 8-2003, published at 69 Fed. Reg. 25180 (2004). The General Counsel held as follows:

Under 38 U.S.C. § 5103(a), the Department of Veterans Affairs (VA), upon receipt of a complete or substantially complete application, must notify the claimant of the information and evidence necessary to substantiate the claim for benefits. Under 38 U.S.C. § 7105(d), upon receipt of a notice of disagreement in response to a decision on a claim, the 'agency of original jurisdiction' must take development or review action it deems proper under applicable regulations and issue a statement of the case if the action does not resolve the disagreement either by grant of the benefits sought or withdrawal of the notice of disagreement. If, in response to notice of its decision on a claim for which VA has already given the section 5103 notice, VA receives a notice of disagreement that raises a new issue, section 7105(d) requires VA to take proper action and issue a statement

  

of the case if the disagreement is not resolved, but section 5103(a) does not require VA to provide notice of the information and evidence necessary to substantiate the newly raised issue.

The Board finds that, in the veteran's case further notice is not required with regard to his claim for an earlier effective date for the grant of service connection for PTSD in that documentation already sent to the veteran has fulfilled VA's notification duties. Specifically, in a statement of the case furnished in September 2002 the RO notified the veteran of the legal authority governing determinations as to effective dates, the evidence considered, and the reasons and bases for the determination made in his case. The RO included a discussion as to the finality of prior decisions relevant to psychiatric disability, the lack of any written statement which could be considered an earlier claim for the benefit sought, and the lack of a diagnosis of PTSD prior to August 2000. Based on these facts, the veteran has been fully advised as to what evidence would be required to show entitlement to an earlier effective date. The veteran has not responded with additional evidence but instead asserts entitlement to an earlier effective date based on evidence and argument already in the claims file and considered in this appeal.

***3** B. Duty to Assist

VA has also fulfilled its duty to assist the veteran under the VCAA and its implementing regulations with regard to the claim decided herein. The RO obtained additional service medical records and afforded the veteran a hearing before a Decision Review Officer. The RO determined that the record with regard to the earlier effective date claim was then complete. The veteran has not identified any additional evidence which is pertinent to the issue on appeal. In this case, based on a determination as to the earliest date of receipt of a reopened claim for service connection for psychiatric disability and the earliest date entitlement to service connection for PTSD arose, remand for additional development would serve no useful purpose. See Soyini v. Derwinski, 1 Vet. App. 540, 546 (1991); Sabonis v. Brown, 6 Vet. App. 426, 430 (1994) (remands which would only result in unnecessarily imposing additional burdens on VA with no benefit flowing to the veteran are to be avoided). As such, the Board finds that all evidence necessary for an equitable resolution of the claim on appeal decided herein has been obtained.

II. Legal Criteria

A specific claim in the form prescribed by the Secretary must be filed in order for benefits to be paid to any individual under the laws administered by VA. 38 U.S.C.A. § 5101(a) (West 2002); 38 C.F.R. § 3.151(a) (2003).

Any communication or action, indicating an intent to apply for one or more benefits under the laws administered by VA, from a claimant, his or her duly authorized representative, a Member of Congress, or some person acting as next friend of a claimant who is not sui juris may be considered an informal claim. Such informal claim must identify the benefit sought. 38 C.F.R. § 3.155(a). See also 38 C.F.R. § 3.1(p) (2003) (Claim--Application means a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement, to a benefit); 38 C.F.R. § 3.160(c) (2003).

Under 38 C.F.R. § 3.400(b)(2)(i), the effective date for a grant of direct service connection will be the day following separation from active service, or the date entitlement arose if a claim is received within one year after separation from service. Otherwise, the effective date is the date of receipt of claim or date entitlement arose, whichever is later. 38 U.S.C.A. § 5110(a); 38 C.F.R. § 3.400.

Where evidence requested in connection with an original claim, a claim for increase or to reopen or for the purpose of determining continued entitlement is not furnished within one year after the date of request, the claim will be considered abandoned. After the expiration of one year, further action will not be taken unless a new claim is received. Should the right to benefits be finally established, compensation based on such evidence shall commence not earlier than the date of filing the new claim. 38 C.F.R. § 3.158.

When a claim is filed and the RO renders an adverse decision, the claimant has the right to disagree with that decision by filing a notice of disagreement within one year from the date of mailing of notice of the decision. 38 U.S.C.A. § 7105(b)(1) (West

  

2002); see also 38 C.F.R. §§ 20.200, 20.302 (2003). Generally, a claim which has been denied may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered. 38 U.S.C.A. § 7104(b) (West 2002); see 38 C.F.R. § 3.105 (2003). The exception to this rule is 38 U.S.C.A. § 5108 (West 2002), which provides that if new and material evidence is presented or secured with respect to a claim which has been disallowed, the Secretary shall reopen the claim and review the former disposition of the claim.

***4** The effective date of a grant of benefits based on a reopened claim is the date of receipt of claim or the date entitlement arose, whichever is the later. 38 C.F.R. § 3.400(r).

The effective date of a grant of benefits based on new and material evidence consisting of service department records received after final disallowance is to agree with evaluation (since it is considered these records were lost or mislaid) or date of receipt of claim on which prior evaluation was made, whichever is later, subject to rules on original claims filed within one year after separation from service. 38 C.F.R. § 3.400(q)(2).

38 C.F.R. § 3.114, pertaining to change of law or Department of Veterans Affairs issue, provides as follows:

(a) Effective date of award. Where pension, compensation, dependency and indemnity compensation, or the monetary allowance under 38 U.S.C. chapter 18 for an individual who is a child of a Vietnam veteran is awarded or increased pursuant to a liberalizing law, or a liberalizing VA issue approved by the Secretary or by the Secretary's direction, the effective date of such award or increase shall be fixed in accordance with the facts found, but shall not be earlier than the effective date of the act or administrative issue. The provisions of this paragraph are applicable to original and reopened claims as well as claims for increase.

(1) If a claim is reviewed on the initiative of VA within one year from the effective date of the law or VA issue, or at the request of a claimant received within one year from that date, benefits may be authorized from the effective date of the law or VA issue.

(2) If a claim is reviewed on the initiative of VA more than one year after the effective date of the law or VA issue, benefits may be authorized for a period of one year prior to the date of administrative determination of entitlement.

(3) If a claim is reviewed at the request of the claimant more than one year after the effective date of the law or VA issue, benefits may be authorized for a period of one year prior to the date of receipt of such request.

III. Factual Background and Analysis

On his initial application form, received in December 1946, the veteran claimed entitlement to service connection for burn scars sustained in an airplane crash in April 1945 and also claimed entitlement to service connection for a nervous condition.

An unappealed RO decision in March 1947 denied entitlement to service connection for a nervous condition. A Board decision in February 1967 denied entitlement to service connection for a psychiatric disability. Those decisions are final. 38 U.S.C. § 709 (1946); (1952); 38 U.S.C. § 4004 (1964 & Supp. 1970).

In a statement received in November 2002, the veteran alleged that the Board's February 1967 decision was ‘in error‘ because at the time of the decision VA had not obtained the official records of the April 1945 airplane crash or the records of his hospitalization in 1945 at a service department hospital during which he underwent a psychiatric evaluation. The veteran's statement does not adequately raise a claim of clear and unmistakable error (CUE) in the prior Board decision insofar as any breach by VA of its duty to assist cannot form a basis for a claim of clear and unmistakable error because such a breach creates only an incomplete record rather than an incorrect one. See 38 U.S.C.A. § 7111(a) (West 2002); 38 C.F.R. § 20.1403 (2003); Caffrey v. Brown, 6 Vet. App. 377, 383-384 (1994). Thus, the finality of the 1967 Board decision is not before the Board for review at this time. See Tetro v. Principi, 314 F.3d 1310 (Fed. Cir. 2003).

  

***5** The basis of the Board's February 1967 denial of service connection for a psychiatric disability was that that the evidence then of record did not show a chronic acquired psychiatric disorder of service origin. The evidence of record at that time included reports of VA examinations in June 1947 and August 1950 which found no neuropsychiatric disease and a report by a private physician in May 1966 that he had diagnosed the veteran with anxiety reaction in July 1946 and the veteran's condition was unchanged in May 1966. Although the record did not contain an official record of the claimed airplane crash, VA did not dispute that the veteran had been a survivor of an airplane crash while he was on active duty.

An RO decision in August 1947 granted entitlement to service connection for burn scars on the face, hand, and right leg, residual to a crash. In a statement received in April 1975, the veteran stated that he wished to reopen his claim for service connection for a psychiatric disability. In a May 1975 letter, the RO notified the veteran as follows:

You were notified in March of 1967 that the Board of Veterans' Appeals had denied your claim for service connection for your nervous condition. You may not now reopen your claim without new and material evidence. If you have such evidence, please submit it. If not our previous decision must stand.

The veteran did not submit any evidence to VA to reopen his claim for service connection for a psychiatric disability within one year of the RO's May 1975 letter, and, consequently, his claim to reopen received in April 1975 is considered to have been abandoned. 38 C.F.R. § 3.158.

From 1975 until 2000 the veteran did not communicate with VA concerning his claim for service connection for a psychiatric disability which had been the subject of a prior final disallowance by the Board in February 1967. His communications with VA during those years on other matters do not contain any attempt to reopen his claim or to file a new claim for service connection for an acquired psychiatric disorder.

On August 25, 2000, the veteran filed a statement with the RO in which he said, 'I would like to see (review) my records - claims file. Am currently being seen at the Brecksville Center for Stress Recovery.' This statement was not a claim to reopen or a new claim for service connection for an acquired psychiatric disorder because it did not identify that any benefit was being sought by the veteran at that time. 38 C.F.R. § 3.155(a).

A VA Form 119, Report of Contact, dated September 6, 2000, noted that the veteran called the RO and stated that he wished to file an informal claim for increased compensation. Psychiatric disability was not referenced in that statement. In any event, the RO liberally construed the veteran's informal claim for increased compensation on September 6, 2000, as a claim to reopen the prior final denial of service connection for a psychiatric disability and then considered a statement received October 23, 2000, as a formal reopened claim.

***6** In the October 23, 2000, statement the veteran stated that he,

wishes to have his claim for service connection of a nervous condition (P.T.S.D. and depression secondary to P.T.S.D.) reopened based on new and material evidence in the form of a recently declassified report of the veteran's plane crash. The report is attached. Also the veteran is currently being treated at the Center for Stress Recovery at Brecksville...Please consider all possibilities and include any other benefits to which the veteran may be entitled.

With his October 23, 2000, statement, the veteran submitted a copy of an Army Air Forces Report of Major Accident, which documented the airplane crash in Panama on April 21, 1945, in which there were four fatalities and the veteran was the sole survivor. This report further corroborated the previously undisputed fact of the plane crash but did not speak to the basis of the prior final denial of service connection for a psychiatric disability (the lack of competent evidence of a chronic psychiatric disorder of service origin).

  

VA treatment records reveal that, on August 28, 2000, a VA clinical social worker diagnosed the veteran with PTSD, which was the first diagnosis of that disorder. On September 6, 2000, a VA psychiatrist also diagnosed PTSD, attributed to the in-service crash.

The United States Court of Appeals for the Federal Circuit held, in the case of a veteran who was service connected for depressive neurosis and asserted a claim for service connection for PTSD, that a claim based upon the diagnosis of a new mental disorder, taken alone or in combination with a prior diagnosis of a related mental disorder, states a new claim when the new disorder had not been diagnosed and considered at the time of a prior notice of disagreement. See Ephraim v. Brown, 82 F. 3d 399, 402 (Fed. Cir. 1996). The Board also takes judicial notice of the fact that organized psychiatry first recognized PTSD as a disorder in 1980. See Diagnostic and Statistical Manual of Mental Disorders, Third Edition (American Psychiatric Association, Feb. 1980) (DSM-III).

Prior to August 28, 2000, the veteran had not been diagnosed with PTSD and the only prior psychiatric diagnosis of record was an episode of anxiety reaction for which service connection was not in effect. The veteran's claim for service connection for PTSD, found by the RO to have been filed September 6, 2000, was, therefore, under the holding in Ephraim, properly considered a new claim. The Board emphasizes that the issue on appeal is entitlement to an earlier effective date for a grant of service connection for PTSD and not for any other acquired psychiatric disorder. As such, effective date rules relevant only to new claims are applicable.

Service connection for PTSD requires medical evidence diagnosing the condition in accordance with 38 C.F.R. § 4.125(a); a link, established by medical evidence, between current symptoms and an in-service stressor; and credible supporting evidence that the claimed in-service stressor occurred. 38 C.F.R. § 3.304(f) (2003).

*7 In this case, the stressor claimed by the veteran is not in dispute. The Report of Major Accident form, received in October 2000, constituted additional credible supporting evidence of a claimed in-service stressor. That stressor was, however, already accepted by VA as having occurred. At a VA psychiatric examination in November 2000, the examiner diagnosed PTSD on Axis I and noted stressors of plane crash in Panama, remote, and current troubles with VA regarding his claim. The November 2000 VA examination diagnosis was based on the veteran's verified stressor, and represented the first diagnosis of PTSD attributed to such stressor. As such, the November 2000 VA examination provided the requisite diagnosis of PTSD and the requisite nexus to warrant a grant of service connection under 38 C.F.R. § 3.304(f).

Although the August 28, 2000, medical record showed a diagnosis of PTSD, at that time VA had not received any claim of entitlement to service connection for PTSD from the veteran. As set out above, the veteran did not evidence any intent to pursue a claim of entitlement to service connection for PTSD prior to September 6, 2000. There is thus no basis under effective date rules relevant to new claims to assign a date earlier than September 6, 2000, as the effective date for the grant of service connection for PTSD. 38 C.F.R. § 3.400(b)(2)(i).

The Board notes, parenthetically, that the conclusion is the same if effective date rules relevant to reopened claims are applied. The effective date of an award of benefits based on a reopened claim is the date of receipt of claim or the date entitlement arose, whichever is later. 38 C.F.R. § 3.400(r). In the veteran's case, as he abandoned his claim to reopen filed in April 1975, the date of receipt of the reopened claim for service connection for a psychiatric disability was not earlier than September 6, 2000, and entitlement to service connection for PTSD did not arise earlier than September 6, 2000, for the reasons discussed above. 38 C.F.R. §§ 3.158, 3.304(f).

The provisions of 38 C.F.R. § 3.400(q)(2), pertaining to new and material evidence consisting of service department records, also do not afford a basis to allow an earlier effective date. First, as set out herein above, the veteran's claim of entitlement to service connection for PTSD, which was granted by the RO, was a new claim and not a claim granted on the receipt of new and material evidence. Moreover, the service clinical records of the veteran's hospitalization in 1945, which were received in

  

September 2002, were negative for findings or a diagnosis of any psychiatric disorder. Thus, even if material to the confirmation of the veteran's stressor, they were not material to the basis of the final denial (existence of a disability of service origin).

Lastly, the Board notes that although PTSD was added to the DSM-III after the initial decision denying the veteran benefits for a psychiatric disorder, 38 C.F.R. § 3.114(a), provides that a claimant cannot receive retroactive payment based on a prospectively effective liberalizing law or a liberalizing VA issue unless the evidence establishes that 'the claimant met all eligibility criteria for the liberalized benefit on the effective date of the liberalizing law or VA issue and that such eligibility existed continuously from that date to the date of claim. In this case, as otherwise stated herein, the veteran did not meet the eligibility criteria for a grant of service connection for PTSD prior to August 2000 in that the evidence of record failed to demonstrate the existence of such disability. To the extent the veteran argues that he has had psychiatric symptoms dating back to service, and that such represented PTSD, the Board is constrained from substituting its own (or the veteran's) medical judgment in place of the diagnoses and findings provided by medical professionals. See Allday v. Brown, 7 Vet. App. 517 (1995); Colvin v. Derwinski, 1 Vet. App. 171 (1991).

***8** For the above reasons, there is no basis to award the veteran an earlier effective date for the grant of service connection for PTSD on this record. 38 U.S.C.A. § 5110(a); 38 C.F.R. § 3.400. As the preponderance of the evidence is against the veteran's claim, the benefit of the doubt doctrine does not apply. 38 U.S.C.A. § 5107 (West 2002).

**ORDER**

Entitlement to an effective date earlier than September 6, 2000, for the grant of service connection for PTSD is denied.

_____ J. M. Daley Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

YOUR RIGHTS TO APPEAL OUR DECISION

The attached decision by the Board of Veterans' Appeals (BVA or 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. We will return your file to your local VA office to implement the BVA'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. None of these things is mutually exclusive - you can do all five things at the same time if you wish. However, if you file a Notice of Appeal with the Court and a motion with the Board at the same time, this may delay your case because of jurisdictional conflicts. If you file a Notice of Appeal with the Court before you file a motion with the BVA, the BVA will not be able to consider your motion without the Court's permission.

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 United States Court of Appeals for Veterans Claims. 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 then have

  

another 120 days from the date the BVA 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 Court is filed on time.

***9** 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 web site on the Internet at www.vetapp.uscourts.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 BVA to reconsider any part of this decision by writing a letter to the BVA stating why you believe that the BVA committed an obvious error of fact or law in this decision, or stating that new and material military service records have been discovered that apply to your appeal. If the BVA has decided more than one issue, be sure to tell us which issue(s) you want reconsidered. Send your letter to: Director, Management and Administration (014) Board of Veterans' Appeals 810 Vermont Avenue, NW Washington, DC 20420

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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 BVA to vacate any part of this decision by writing a letter to the BVA stating why you believe you were denied due process of law during your appeal. 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 above for the Director, Management and Administration, 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 above for the Director, Management and Administration, 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.

***10** 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 BVA, 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: 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 VA, then you can get information on how to do so by writing directly to the Court. Upon request, the Court will provide you with a state-by-state listing of persons admitted to practice before the Court who have indicated their availability to represent appellants. This information is also provided on the Court's website at www.vetapp.uscourts.gov.

Do I have to pay an attorney or agent to represent me? Except for a claim involving a home or small business VA loan under Chapter 37 of title 38, United States Code, attorneys or agents cannot charge you a fee or accept payment for services they provide before the date BVA makes a final decision on your appeal. If you hire an attorney or accredited agent within 1 year of a final BVA decision, then the attorney or agent is allowed to charge you a fee for representing you before VA in most situations. An attorney can also charge you for representing you before the Court. VA cannot pay fees of attorneys or agents.

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. For more information, read section 5904, title 38, United States Code.

In all cases, a copy of any fee agreement between you and an attorney or accredited agent must be sent to:

Office of the Senior Deputy Vice Chairman (012) Board of Veterans' Appeals 810 Vermont Avenue, NW Washington, DC 20420

The Board may decide, on its own, to review a fee agreement for reasonableness, or you or your attorney or agent can file a motion asking the Board to do so. Send such a motion to the address above for the Office of the Senior Deputy Vice Chairman at the Board.

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Bd. Vet. App. 0421123, 2004 WL 3296516

# EXHIBIT B

Bd. Vet. App. 0639859, 2006 WL 4444798

Board of Veterans Appeals

Department of Veterans' Affairs

[TITLE REDACTED BY AGENCY]

03-28 955
Decision Date: 12/27/06
Archive Date: 01/05/07

***1** On appeal from the Department of Veterans Affairs Regional Office in Denver, Colorado

THE ISSUE

Entitlement to service connection for post-traumatic stress disorder (PTSD).

**REPRESENTATION**

Veteran represented by:Disabled American Veterans
WITNESS AT
HEARING ON APPEAL
Veteran
ATTORNEY FOR THE BOARD
J. Alsup, Associate Counsel

**INTRODUCTION**

The veteran served on active duty from July 1963 to June 1965.

This case comes before the Board of Veterans Appeals (the Board) on appeal from an August 2002 rating decision of the Department of Veterans Affairs (VA) Regional Office in Denver, Colorado (RO) which denied the veteran's December 2001 claim of entitlement to service connection for PTSD. The veteran disagreed and timely appealed.

In September 2006, the veteran and his representative presented testimony at a hearing at the RO before the undersigned Veterans Law Judge (VLJ). A transcript of the hearing has been associated with the veteran's VA claims folder.

**FINDINGS OF FACT**

1. A preponderance of the competent medical evidence of record supports a conclusion that PTSD does not exist.

2. The veteran is not a veteran of combat.

3. There are no confirmed in-service stressors.

**CONCLUSION OF LAW**

  

Post-traumatic stress disorder was not incurred in or aggravated by military service. 38 U.S.C.A. § 1110, 1131 (West 2002); 38 C.F.R. §§ 3.303, 3.304(f) (2006).

## REASONS AND BASES FOR FINDINGS AND CONCLUSION

The veteran seeks service connection for PTSD. He contends, in substance, that while on active duty in the United States Navy from 1963-1965 he witnessed cruel treatment of prisoners, saw amputees and other hospital patients recovering from combat wounds, and was sexually assaulted by other sailors while on board the U.S.S. General J.C. Breckinridge, T-AP 176 (hereinafter, 'the Breckinridge'), and that his subsequent mental problems resulted from such purported incidents.

The Board will first discuss certain preliminary matters. The issue on appeal will then be analyzed and a decision rendered.

The Veterans Claims Assistance Act of 2000

The Board has given consideration to the Veterans Claims Assistance Act of 2000 (the VCAA). The VCAA enhanced VA's duty to notify a claimant about the information and evidence necessary to substantiate claims for VA benefits. The VCAA also redefined VA's obligations with respect to its statutory duty to assist claimants in the development of their claims. See 38 U.S.C.A. §§ 5103, 5103A (West 2006).

The VCAA alters the legal landscape in three distinct ways: standard of review, notice and duty to assist. The Board will now address these concepts within the context of the circumstances presented in this case.

Standard of review

After the evidence has been assembled, it is the Board's responsibility to evaluate the entire record. See 38 U.S.C.A. § 7104(a) (West 2002). When there is an approximate balance of evidence regarding the merits of an issue material to the determination of the matter, the benefit of the doubt in resolving each such issue shall be given to the claimant. 38 U.S.C.A. § 5107 (West 2002); 38 C.F.R. § 3.102 (2006).

***2** In Gilbert v. Derwinski, 1 Vet. App. 49, 53 (1990), the United States Court of Appeals for Veterans Claims (the Court) stated that 'a veteran need only demonstrate that there is an 'approximate balance of positive and negative evidence' in order to prevail.' To deny a claim on its merits, the preponderance of the evidence must be against the claim. See Alemany v. Brown, 9 Vet. App. 518, 519 (1996), citing Gilbert, 1 Vet. App. at 54.

Notice

The VCAA requires VA to notify the claimant and the claimant' s representative, if any, of any information and any medical or lay evidence not previously provided to VA that is necessary to substantiate the claim. As part of the notice, VA is to specifically inform the claimant and the claimant' s representative, if any, of which portion, if any, of the evidence is to be provided by the claimant and which part, if any, VA will attempt to obtain on behalf of the claimant. See 38 U.S.C.A. § 5103 (West 2002); see also Quartuccio v. Principi, 16 Vet. App. 183 (2002) [a letter from VA to an appellant describing evidence potentially helpful to the appellant but not mentioning who is responsible for obtaining such evidence did not meet the standard erected by the VCAA]. After careful review, the Board has concluded that the notice requirements of the VCAA have been satisfied with respect to the issues on appeal.

The Board observes first that the veteran was provided notice of VA's obligations in letters dated January 2002 and June 2004. In both letters, the veteran was informed that to establish entitlement to service connection, the evidence must show:

  

1. An injury in military service, or a disease that began in or was made worse during military service, or an event in service causing injury or disease.

2. A current physical or mental disability.

3. A relationship between your current disability and an injury, disease, or event in military service.

See the January 2002 VCAA letter, page 2; June 2004 letter, pages 5 and 6.

In addition, the both letters specifically informed the veteran that the veteran must submit evidence of a current medical diagnosis of PTSD, and medical evidence that establishes a relationship between the diagnosis of PTSD and an in-service stressful event.

Both letters also informed the veteran of the typical kinds of evidence that could be used to support the claim, such as medical records, a statement from his doctor, his statements and statements of others who could observe his symptoms. The RO also provided a PTSD questionnaire that assisted the veteran to refine his claim and identify any supporting evidence. These notices satisfy the VCAA obligation to inform a claimant of the evidence required to substantiate a claim.

The veteran was informed that VA would provide a medical examination if it was deemed necessary to substantiate his claim. The veteran was also informed that VA would obtain records such as records held by Federal agencies, including service records and VA medical records, employment records, and private medical records so long as he provided sufficient information to allow VA to obtain them.

***3** Both letters also told the veteran that if he had any additional information or evidence to send it to VA or tell them about it. See the January 2002 letter, p. 9 and the June 2004 letter, p. 1. In essence, the veteran was asked to 'give us everything you've got', in compliance with 38 C.F.R. § 3.159(b)(1). See Pelegrini v. Principi, 17 Vet. App. 412 (2004).

The veteran's hearing testimony and numerous written statements makes it clear that he is aware of his obligations to support his claim with evidence.

In short, the record indicates that the veteran received appropriate notice under 38 U.S.C.A. § 5103 and Quartuccio.

In Dingess v. Nicholson, 19 Vet. App. 473 (2006), the Court observed that a claim of entitlement to service connection consists of five elements: (1) veteran status; (2) existence of a disability; (3) a connection between the veteran's service and the disability; (4) degree of disability; and (5) effective date.

Because a service connection claim is comprised of five elements, the Court further held that the notice requirements of section 5103(a) apply generally to all five elements of that claim. Therefore, upon receipt of an application for service connection, section 5103(a) and section 3.159(b) require VA to review the information and the evidence presented with the claim and to provide the claimant with notice of what information and evidence not previously provided, if any, will assist in substantiating or is necessary to substantiate the elements of the claim as reasonably contemplated by the application. This includes notice that a disability rating and an effective date for the award of benefits will be assigned if service connection is awarded.

The Board observes that the veteran was specifically informed of Dingess v. Nicholson in a letter dated July 2006. He was specifically informed how VA makes a determination of disability rating and determines an effective date of disability.

In this case, element (1), veteran status, is not at issue. Moreover, elements (4) and (5), degree of disability and effective date, are rendered moot via the RO's denial of service connection. In other words, any deficiency of advisement as to those two elements is meaningless, because a disability rating and effective date were not, and cannot be assigned in the absence of service connection. The veteran's claim of entitlement to service connection was denied based on elements (2) and (3), a current

disability, and a connection between the veteran's service and the disability. As explained above, he has received proper VCAA notice as to his obligations, and those of VA, with respect to those crucial elements.

Duty to assist

In general, the VCAA provides that VA shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate claims for VA benefits, unless no reasonable possibility exists that such assistance would aid in substantiating the claim. The law provides that the assistance provided by VA shall include providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim. An examination is deemed 'necessary' if the record does not contain sufficient medical evidence for VA to make a decision on the claim. See 38 U.S.C.A. § 5103A (West 2002); 38 C.F.R. § 3.159 (2006).

***4** The Board finds that reasonable efforts have been made to assist the veteran in obtaining evidence necessary to substantiate his claim, and that there is no reasonable possibility that further assistance would aid in substantiating them. Specifically, the RO has obtained the veteran's service medical records. The veteran has been accorded a VA examination.

The veteran has indicated during his personal hearing that he believes there may be medical records not in the claims folder that support his claim. Specifically, he believes the record is missing medical records from Denver General Hospital and the University of Colorado Hospital, which he claims document diagnoses in the mid-1960's for PTSD.

As is discussed below, the Board is denying the veteran's claim for service connection for PTSD because there is no evidence of a current disability and no evidence of a verified stressor. Four decades old records from Denver General Hospital and the University of Colorado Hospital, which would at best document a past history of mental illness, would be of no probative value. Moreover, the Board takes judicial notice of the fact that PTSD was not an official diagnosis until 1980. The veteran's statement to the effect that he was diagnosed as having PTSD in the 1960s is inherently incredible.

The Board also notes that the veteran has requested that his military pay records be obtained, ostensibly to prove that he was in Vietnam. However, the official records which are already in the claims folder clearly establish that the veteran was not Vietnam. Indeed, the veteran's military personnel records document each command to which the veteran was assigned during his two years of active duty. The veteran has not explained how his pay records would establish his location or how such would be of greater probative value that the personnel records already in the file. As the Court has stated: 'VA's . . . 'duty to assist' is not a license for a 'fishing expedition' to determine if there might be some unspecified information which could possibly support a claim.' Gobber v. Derwinski, 2 Vet. App. 470, 472 (1992).

Accordingly, the Board finds that under the circumstances of this case, the VA has satisfied the notification and duty to assist provisions of the law and that no further actions pursuant to the VCAA need be undertaken on the veteran's behalf.

The Board additionally observes that all appropriate due process concerns have been satisfied. See 38 C.F.R. § 3.103 (2006). The veteran has been accorded the opportunity to present evidence and argument in support of his claim. As noted in the Introduction, the veteran and his representative appeared before the undersigned VLJ in September 2006, and presented evidence in support of his claim.

Accordingly, the Board will proceed to a decision on the merits.

Relevant Law and Regulations

Service connection - in general

  

A disability may be service-connected if it results from an injury or disease incurred in, or aggravated by, military service. 38 U.S.C.A. § 1110, 1131 (West 2002); 38 C.F.R. § 3.303 (2006).

***5** In order to establish service connection for the claimed disorder, there must be (1) medical evidence of a current disability; (2) medical, or in certain circumstances, lay evidence of in-service incurrence or aggravation of a disease or injury; and (3) medical evidence of a nexus between the claimed in-service disease or injury and the current disability. See Hickson v. West, 12 Vet. App. 247, 253 (1999). The determination as to whether these requirements are met is based on an analysis of all the evidence of record and the evaluation of its credibility and probative value. See Baldwin v. West, 13 Vet. App. 1, 8 (1999).

Service connection - PTSD

Service connection for PTSD requires medical evidence diagnosing the condition in conformance with DSM IV, section 309.81; a link, established by medical evidence, between current symptoms and an in-service stressor; and credible supporting evidence that the claimed in-service stressor occurred. 38 C.F.R. §§ 3.304(f), 4.125(a) (2006).

The evidence necessary to establish the occurrence of a stressor during service to support a claim for PTSD will vary depending on whether the veteran was 'engaged in combat with the enemy.' See Hayes v. Brown, 5 Vet. App. 60, 66 (1993). If the evidence establishes that the veteran was engaged in combat with the enemy or was a prisoner of war (POW), and the claimed stressor is related to combat or POW experiences (in the absence of clear and convincing evidence to the contrary, and provided that the claimed stressor is consistent with the circumstances, conditions, or hardships of the veteran's service), the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor.

Where, however, VA determines that the veteran did not engage in combat with the enemy and was not a POW, or the claimed stressor is not related to combat or POW experiences, the veteran's lay statements, by themselves, will not be enough to establish the occurrence of the alleged stressor. Instead, the record must contain service records or other credible evidence which corroborates the stressor. See 38 U.S.C.A. § 1154(b) (West 2002); 38 C.F.R. § 3.304(d), (f) (2006); Gaines v. West, 11 Vet. App. 353, 357-58 (1998).

In Patton v. West, 12 Vet. App. 272 (1999), the Court held that special consideration must be given to claims for PTSD based on sexual assault. In particular, the Court held that the provisions in M21-1, Part III, 5.14(c), which address PTSD claims based on personal assault, are substantive rules that are the equivalent of VA regulations and must be considered. See also YR v. West, 11 Vet. App. 393, 398-99 (1998).

Paragraph 5.14c states that, in cases of sexual assault, development of alternate sources for information is critical. There is provided an extensive list of alternative sources competent to provide credible evidence that may support the conclusion that the event occurred, to include medical records, military or civilian police reports, reports from crisis intervention centers, testimonial statements from confidants, and copies of personal diaries or journals. See M21-1, Part III, 5.14(c)(8). Also of particular pertinence are the provision of subparagraphs (8) and (9) of Section 5.14 which state that '[b]ehavior changes that occurred at the time of the incident may indicate the occurrence of an in-service stressor.' The Court in Patton stated that such changes in behavior should be examined and clinically interpreted to determine whether they constitute evidence of '[v]isits to a medical or counseling clinic or dispensary without a specific diagnosis or specific ailment.'

***6** Analysis

Initial comments The Board observes that the veteran has limited his appeal specifically to the issue of his entitlement to service connection for PTSD. See the veteran's October 2005 substantive appeal [VA Form 9], as well as the veteran's statements at the September 2006 hearing. Moreover, this case has been developed by the RO strictly on the basis of the veteran's entitlement to service connection for PTSD. Accordingly, the Board need not address the matter of the veteran's entitlement to service connection for any other psychiatric disability. The veteran has claimed two separate and distinct stressors to support his claim

  

for service connection for PTSD. First, he claimed he was exposed to stressful events as part of a detail that brought military prisoners to the Breckinridge from locations in Vietnam, and that he witnessed cruel treatment that those prisoners purportedly suffered while on the Breckinridge. Later, after his claim was denied and after he received the Statement of the Claim (SOC), he submitted a statement that added an additional theory, claiming that he had been sexually assaulted on board the Breckinridge.

The RO, in a February 2004 supplemental SOC, informed the veteran that the sexual assault contention was a separate claim. However, the contention that the veteran was sexually assaulted is merely another stressor and thus another theory to support the same claim for service connection for PTSD. See Ashford v. Brown, 10 Vet. App. 120, 123 (1997) [a different etiological theory underlying a claimed disorder does not constitute a new claim]. Thus, only one issue exists.

Discussion

As noted above, 38 C.F.R. § 3.304(f) sets forth the three elements required to establish service connection for PTSD. The record must show: (1) a current medical diagnosis of PTSD; (2) medical evidence of a causal nexus between PTSD and the claimed in-service stressor; and (3) credible supporting evidence that the claimed in-service stressor actually occurred. Because the outcome of this appeal hinges in large measure on the mater of confirmed stressors, the Board will address this element first.

As has been discussed in the law and regulations section above, if a veteran is not a veteran of combat, his stressors must be confirmed. Here, there is no indication that the veteran is a veteran of combat. His official records do not contain any indication whatsoever of combat status. In his five written statements and at his hearing, the veteran never once stated he was in combat. Thus, the veteran's statements, by themselves, will not be enough to establish the occurrence of the alleged stressor. Instead, the record must contain credible evidence which corroborates the claimed stressors. Such evidence is lacking. As was alluded to above, the veteran initially gave as his stressor various purportedly stressful events revolving around Vietnamese prisoners. It was only after the veteran received the RO's rating decision and SOC, both of which denied the PTSD claim and gave him the reasons why it was denied, that he recalled a purported rape that had occurred some 37 years earlier. These stressors, the veteran claims, caused his claimed PTSD.

*7 The veteran first contended that he was exposed to stressful events as part of a detail that brought military prisoners to the Breckinridge from locations in Vietnam. He never described with any detail the ‘who, what, when or where‘. More to the point, he never explained how he came to be in Vietnam, when his official records did not show him there.

With regard to stressors regarding Vietnam, the record is replete with evidence that the veteran was never there. For purposes of clarity, the Board will state the veteran's military history. Service personnel records show that the veteran reported for recruit training at Great Lakes Recruit Training Command on July 17, 1963. He was transferred to a command located at the Naval Station in San Diego, California on October 17, 1963 and assigned as a typist. He was hospitalized fro inguinal hernia repair at the U.S. Naval Hospital in San Diego on November 11, 1963 and departed the hospital on November 27, 1963. He was transferred from San Diego to the Breckinridge on October 15, 1964. He was transferred from the Breckinridge on June 23, 1965, and discharged at U.S. Naval Station Treasure Island, San Francisco, California on June 28, and arrived at his reserve address on June 30, 1965.

Nothing in the veteran's DD-214 form indicates that he was ever in Vietnam, and nothing in his service medical records indicates that he was in Vietnam. The deck logs of the Breckinridge indicate the ship's location at the first and last day of the month, for all of the months the veteran was on board. None of those locations indicate that the Breckinridge was located in, nor was en route to or from, the coastal waters of Vietnam. A record from the Department of the Navy indicated that the veteran was not entitled to wear the Vietnam service medal.

In sum, after review of the entire record, the Board finds that the veteran was not in Vietnam. The Board observes in passing that this case is somewhat similar to Samuels v. West, 11 Vet. App. 433, 436 (1999) [where a veteran sought service connection for post- traumatic stress disorder, based upon multiple stressors occurring during ‘combat‘ in Vietnam, and the record clearly

showed he had never served in Vietnam, no presumption of credibility attached to his statements of his in-service claimed stressors]. Here, unlike in Samuels, there is no presumption of credibility. In any event, the Board discounts the veteran's statements as unbelievable. Thus, any stressor events that purportedly occurred in or resulted from events in Vietnam are incredible and cannot support the claim.

The veteran further contends that he witnessed the cruel treatment that those prisoners suffered while on the Breckinridge. The Board finds the statements to be wholly incredible. There is nothing of record to corroborate the veteran's contentions, and the veteran has not explained how Vietnamese prisoners came to be aboard the Breckinridge.

With regard to the later claimed story that the veteran was sexually assaulted aboard the Breckinridge, he contends that one night when the Breckinridge was at sea, a sailor in the same berthing compartment came into the compartment after having been assaulted. The veteran submits that upon learning that the sailor had been assaulted by a group of Filipino sailors, he immediately proceeded, evidently alone, to determine who they were and what had happened. He claims that he too was attacked by the sailors and was raped.

***8** The veteran has not satisfactorily explained why he would take it upon himself to investigate the rape of a shipmate instead of reporting it to proper authorities. In any event, he stated that he never told anyone about the purported sexual assault until he told Dr. S.M. in 2002. He has not provided sufficient detail to allow VA to seek corroborating evidence.

A review of the veteran's contemporaneous service medical records and personnel records do not indicate any report made by the veteran that he was sexually assaulted or even threatened with sexual assault. Moreover, there is no indication of psychic trauma in service. The Board places greater weight on the pertinently negative contemporaneous records than it does on the veteran's recollections decades after. See Curry v. Brown, 7 Vet. App. 59, 68 (1994) [contemporaneous evidence has greater probative value than history as reported by the veteran].

The veteran has not been specific concerning the alleged stressors. In particular, he did not name any individual(s) involved, only that one was a First or Second Class Boatswains Mate, and that the attackers were Filipino. The Board observes that it is curious, to say the least, that the veteran refers to an event which he claims to be a watershed event in his life which caused mental illness, yet he did not report anything at the time but rather waited more than 35 years before he told anyone about it, and now cannot recall the names of any of the persons involved.

The veteran has not submitted any evidence, such as statements from fellow service members, which would serve to support his account. See 38 U.S.C.A. § 5107(a) (West 2002) [it is a claimant's responsibility to support a claim for VA benefits].

The Board observes that a decrease in efficiency may be a sign of an in-service assault. See M21-1, Part III, 5.14(c). There is no indication of an decrease in efficiency, and a June 10, 1965 record indicates that the veteran was recommended for reenlistment.

The Board observes that the veteran was subject to a Captain's Mast in March 1964 for misappropriation of a government vehicle driving such vehicle in an unlawful manner, and failing to obey a lawful order. He received 14 days' restriction, which strongly suggests that this was an incident of joyriding (the veteran was 18 years of age at the time). In any event, this was before the veteran joined the crew of the Breckinridge in October 1964. There is nothing in the record to indicate that the veteran's performance aboard the Breckinridge was anything but satisfactory.

In addition to the two primary reported stressors, discussed above, the veteran contends that he was admitted to Balboa Naval Hospital in San Diego, California, and that while he was there, he was exposed to servicemen who had been wounded in combat, and stated that he had nightmares after seeing those wounded veterans. Service medical records show that the veteran was admitted to Naval Hospital in San Diego, California for about 16 days, from November 11, 1963 to November 27, 1963, for repair of an inguinal hernia. Although logic would dictate that he saw and interacted with other patients, there is no corroborating

  

evidence that the veteran was ever exposed to combat-wounded servicemen. In this connection, the Board takes judicial notice that there was no significant combat involving U.S. Naval or Marine forces in Vietnam in 1963.

***9** Based on this record, the Board finds that the veteran's statements regarding his alleged stressors are not corroborated by the evidence of record. The claim fails on this basis.

The Board has the fundamental authority to decide in the alternative. See Luallen v. Brown, 8 Vet. App. 92, 95-6 (1995), citing Holbrook v. Brown, 8 Vet. App. 91, 92 (1995). For the sake of completeness, the Board will also discuss the remaining two 38 C.F.R. § 3.304(f) elements.

Regarding the first element, current disability, there is conflicting evidence as to whether PTSD in fact exists. By law, the Board is obligated under 38 U.S.C. § 7104(d) to analyze the credibility and probative value of all evidence, account for the evidence which it finds to be persuasive or unpersuasive, and provide reasons for its rejection of any material evidence favorable to the veteran. See, e.g., Eddy v. Brown, 9 Vet. App. 52 (1996). The Board has the authority to 'discount the weight and probity of evidence in the light of its own inherent characteristics and its relationship to other items of evidence.' See Madden v. Brown, 125 F.3d 1477, 1481 (Fed. Cir. 1997). The Board may not reject medical opinions based on its own medical judgment. See Colvin v. Derwinski, 1 Vet. App. 171 (1991); Obert v. Brown, 5 Vet. App. 30 (1993).

The Board may appropriately favor the opinion of one competent medical authority over another. See Owens v. Brown, 7 Vet. App. 429, 433 (1995); Wensch v. Principi, 15 Vet. App. 362, 367 (2001). In analysis of cases involving multiple medical opinions, each medical opinion should be examined, analyzed and discussed for corroborative value with other evidence of record. See Wray v. Brown, 7 Vet. App. 488, 492-493 (1995).

The veteran was diagnosed with PTSD in a January 2002 opinion by Dr. S.M., Psy.D. However, as noted above, service connection for PTSD requires medical evidence diagnosing the condition in conformance with DSM IV, section 309.81. Section 309.81 requires the examiner to determine that the 'person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or other.' As is thoroughly discussed above, the veteran's contentions that he experienced such an event are incredible.

In contrast to Dr. S.M., in February 2002, Dr. J.R., also a psychologist, diagnosed the veteran with dysthymic disorder and personality disorder. Dr. J.R. specifically noted that the PTSD symptoms described by Dr. S.M. were not manifest during his examination. Dr. J.R. found that the veteran's description of a stressor event, as is required by DSM IV, section 309.81, was very vague, and that the veteran was 'particularly evasive' when he was asked about the stressful events necessary for a PTSD diagnosis. The Board finds that Dr. J.R.'s assessment is more congruent with the record evidence as a whole than that of Dr. S.M.

The Board observes that Dr. S.M. appears to have simply accepted as fact the statements of the veteran concerning his alleged stressors. As explained in detail above, however, a review of the record, however shows that there is nothing that indicates the veteran was ever near the coastal waters of Vietnam, much less in-country in Vietnam; there is no evidence that he was ever assigned to guard POWs, and there is no evidence that the veteran was raped while on board the Breckinridge.

***10** The Board notes, as did Dr. S.M., that the veteran has been exceedingly vague and evasive as to how he, as an able seaman in the United States Navy with no training in POW handling and no Vietnam service, would have come into contact with Vietnamese prisoners. See the September 2006 hearing transcript, page 7. The Board also observes that the detail of the sexual assault story (and the story about coming into contact with combat wounded servicemen in 1963) is just as vague as the detail of the Vietnam prisoner theory. The Board thus concludes that the evidence of record does not support the diagnosis of Dr. J.R. For those reasons, the Board finds that the preponderance of the evidence supports a finding that the veteran does not have PTSD, and thus element (1) is also not satisfied.

  

With regard to medical nexus, the only medical evidence of a nexus of PTSD to an in-service stressor is contained in Dr. S.M.'s January 2002 opinion. However, as was noted immediately above, Dr. S.M. totally accepted the statements of the veteran; those statements are not corroborated and incredible. Thus, the only medical evidence of a nexus of PTSD to an in-service stressor necessarily relies on incredible evidence and is of little probative value. For this reason too the veteran's claim fails.

Conclusion

For the reasons stated above, the Board finds that the preponderance of the evidence is against a finding of entitlement to service-connection for PTSD. The benefits sought on appeal are accordingly denied.

**ORDER**

Entitlement to service connection for post-traumatic stress disorder is denied.

_____ Barry F. Bohan Veterans Law Judge, Board of Veterans' Appeals

Department of Veterans Affairs

Bd. Vet. App. 0639859, 2006 WL 4444798

**End of Document**