Vet. App. No. 19-2412

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

SAM RAY STAGGS,
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

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	)	
Appellee.	)	

ON APPEAL FROM THE BOARD OF VETERANS' APPEALS

BRIEF OF THE APPELLEE SECRETARY OF VETERANS AFFAIRS

I. ISSUES PRESENTED

1. Whether the Court should affirm the July 6, 2017 decision of the Board of Veterans' Appeals (Board), which denied Appellant's motion to revise, on the basis of clear and unmistakable error (CUE), the December 2002 rating decision that granted service connection for post-traumatic stress disorder (PTSD) with an effective date of March 11, 2000.

2. Whether the Court should review the Chairman of the Board's February 12, 2019 ruling which denied Appellant's motion for reconsideration of the Board's July 6, 2017 decision in light of Appellant's failure to submit evidence

or argument showing that the Board committed an obvious error of fact or law in the underlying decision.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has jurisdiction pursuant to 38 U.S.C. § 7252(a).

B. Nature of the Case

On July 6, 2017, the Board issued a decision in which it denied Appellant's motion to revise, based on CUE, a December 2002 rating decision that granted service connection for PTSD with an effective date of March 11, 2000. [Record Before the Agency (R.) at 5–11]. The Board noted that in his filings, Appellant appeared to challenge many agency actions subsumed within a May 1996 Board decision. [R. at 8–9 (5–11)]. The Board could not review those actions, however, as Appellant challenged them on appeal to this Court and lost. *Id.* Further, although Appellant generally claimed that the effective date for the grant of service connection should go back to 1994, as he believed that was the first date of diagnosis, he did not present evidence or argument demonstrating that some specified portion of the December 2002 rating decision was based on incorrect facts or that it was so obviously in error that reasonable minds could not disagree about the correct outcome. [R. at 9–10 (5–11)]. Consequently, the Board denied his CUE motion.

On July 19, 2017, Appellant filed a motion for reconsideration of the July 6, 2017 Board decision. [Appendix (Appx.) at 3–7].[1] The Chairman of the Board, through his delegate, issued a ruling on that motion on February 12, 2019. *Id.* at 1–2. The Chairman denied the motion, finding that Appellant had not demonstrated that the Board's July 2017 decision contained an obvious error of fact or law. *Id.* at 2. Appellant had reiterated arguments made to the Board, but, as the Chairman found, this was no basis for reconsideration since the Board's findings were plausibly supported in the record and soundly reasoned. *Id.* Further, said the Chairman, the purportedly new evidence Appellant submitted with his motion was not, in fact, new; he had submitted it to VA several times before. *Id.*

C. Statement of Relevant Facts

Appellant served on active duty in the U.S. Army from April 1970 to December 1971. [R. at 2303]. He sought service connection for nerves in a November 1984 application for benefits. [R. at 2257–60]. The claim was denied in a rating decision issued in January 1985. [R. at 2255].

Appellant then sought service connection for PTSD in June 1987. [R. at 2248–51]. The RO determined that Appellant's claim could not be reopened absent

[1]Although Appellant's submissions on appeal appear to contain allegations of error as to the ruling on his motion for reconsideration, neither his motion nor the ruling on it should be included in the Record Before the Agency pursuant to 38 U.S.C. § 7252(b) and *Rogozinski v. Derwinski*, 1 Vet.App. 19, 20 (1990). *See infra* Part IV.B. To aid the Court in its consideration of Appellant's arguments as they relate to the motion for reconsideration and the ruling denying the motion, the Secretary has submitted the motion and the ruling in an Appendix to this brief.

the submission of new evidence and informed him that no further action would be taken unless such evidence was received. *See* [R. at 2246] (June 1987 VA correspondence). In the instant decision, the Board noted that the claim was denied in a September 1987 rating decision, [R. at 8 (5–11)], but that rating decision is not of record.

However, Appellant filed a request in April 1993 to reopen his PTSD claim, suggesting that the claim had previously been denied. [R. at 2186]. At a June 1993 VA PTSD examination, the physician diagnosed Appellant with major depression and passive-aggressive personality traits under the then-applicable third edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-III), but did not diagnose PTSD. [R. at 2121 (2119–21)]. The April 1993 claim was denied in a September 1993 rating decision. [R. at 2110–11].

On appeal, a hearing officer issued a decision in February 1994 continuing the denial of service connection. [R. at 2095–96]. The hearing officer reasoned that although Appellant presented two private medical opinions indicating potential diagnoses of PTSD, *see* [R. at 2063] (January 1994 letter from Patrick Work); [R. at 2065] (November 1993 letter from Dr. Robert Gaston), neither came from a board-certified psychiatrist and neither identified any traumatic military experience or other criteria on which to base such a diagnosis, [R. at 2095 (2095–96)]. By contrast, the June 1993 VA examiner applied the relevant diagnostic criteria to Appellant's reported symptoms and rendered no PTSD diagnosis. [R. at 2095–96];

see also [R. at 2048–52] (February 1994 Statement of the Case (SOC)). Appellant continued his appeal in March 1994. *See* [R. at 2044–45].

In a March 1994 rating decision, the agency continued the denial of service connection for PTSD. [R. at 2032–33]. The RO held that the submission of a February 1994 letter from a private psychologist, Dr. Harry Steuber, indicating that Appellant suffers from PTSD, [R. at 2042–43], did not provide findings sufficient to support a diagnosis of PTSD under the DSM-III, [R. at 2032 (2032–33)]; *see also* [R. at 2023–25] (March 1994 Supplemental Statement of the Case (SSOC)). Appellant disputed this decision. *See* [R. at 2059–60] (March 1994 VA Form 9).

Another rating decision issued in October 1995 reached the same conclusion based on the findings of a September 1995 VA PTSD examination. [R. at 1964–65]; [R. at 1966–70] (September 1995 PTSD examination). A further SSOC, issued in October 1995, continued the denial of benefits. [R. at 1957–58]. After an additional VA PTSD examination in November of that year, [R. at 1944–55], VA issued another rating decision in December 1995 continuing to deny service connection, [R. at 1942–43], as well as another SSOC, [R. at 1939–41].

On appeal, the Board issued a decision in May 1996. [R. at 1912–21]. It denied the claim. *Id.* Appellant's motion for reconsideration of that decision was also denied. [R. at 1875–78] (May 1996 motion for reconsideration); [R. at 1871–73] (September 1996 ruling on motion for reconsideration). Appellant appealed to this Court, which affirmed the May 1996 Board decision in a December 1998 memorandum decision. [R. at 1852–57]. The Court also denied a motion for

reconsideration by a panel in February 1999. [R. at 1759]. Appellant did not appeal the Court's decisions, and so they became final. *See* 38 U.S.C. § 7291(a).

While Court proceedings were ongoing, Appellant filed a statement in January 1999 with additional medical evidence in support of his PTSD claim, seeking to reopen the previously denied claim. [R. at 1849]. The evidence consisted of a March 1998 private psychological evaluation by Dr. Lucas Van Orden, who diagnosed Appellant with PTSD. [R. at 1832–35]. Later, Appellant submitted another private psychological evaluation report from Thomas Pettigrew at the Tennessee Disability Determination Services, dated May 1999, providing a diagnosis of PTSD under the DSM-IV. [R. at 1790–96]. The agency denied reopening of the claim in a June 1999 rating decision. [R. at 1777–78].

Appellant was afforded a VA PTSD examination in November 1999. [R. at 1743–47]. The examiner found that Appellant's symptoms did not meet the diagnostic criteria for PTSD. [R. at 1746–47 (1743–47)]. Instead, he suffered from recurrent, mild major depressive disorder and personality disorder not otherwise specified. [R. at 1746–47 (1743–47)]. VA issued a rating decision in December 1999 denying service connection in light of this new evidence. [R. at 1740–42].

Appellant initiated an appeal of the June 1999 rating decision in January 2000. [R. at 1732–38]. VA continued denial of reopening in a February 2000 SOC. [R. at 1718–28]. In April 2000, VA received a March 11, 2000 private psychological evaluation report authored by Dr. Roger Barnes, who diagnosed Appellant with

PTSD. [R. at 1709–13]. Appellant perfected his appeal in August of that year. [R. at 1655].

After procuring further examinations and relevant medical records, *see, e.g.*, [R. at 1604–06] (April 2001 VA PTSD examination); [R. at 1568–81] (January 2002 VA PTSD examination); [R. at 1695–1707] (February 2000 VA personality assessment inventory); [R. at 1687–94] (February 2000 trauma symptoms inventory prepared for Dr. Barnes); [R. at 1668–85] (March 2000 Baugh Relationship Index report by Dr. James Baugh); [R. at 1448–1529] (VA treatment records for the period of July to December 2002), VA issued a decision review officer rating decision in December 2002 which granted service connection for PTSD, [R. at 1442–47]. The agency assigned an effective date for service connection of March 11, 2000, and granted a rating of 30 percent from that date, along with a temporary 100 percent evaluation for an episode of hospital treatment in mid-2002. [R. at 1443 (1442–47)].

The regional office (RO) determined that March 11, 2000 was the appropriate effective date for the award of service connection because this was the date of Dr. Barnes' "comprehensive psychiatric evaluation" in which Appellant was diagnosed with PTSD. [R. at 1444 (1442–47)]. Although other examinations with PTSD diagnoses pre-dated Dr. Barnes' March 2000 report, the RO found that the record evidence demonstrated Appellant's tendency to exaggerate his symptoms and that his worsening symptoms could be based, in part, on another underlying personality disorder. [R. at 1444, 1446 (1442–47)]. Thus, the RO based

its determination of the effective date for the award of service connection for PTSD on "the facts found." [R. at 1444 (1442–47)].

Following this decision, Appellant submitted a statement in February 2003 indicating that he desired "an increased rating." [R. at 1432]. He did not suggest any dispute as to the assigned effective date for the grant of service connection. *See id.*; *see also* [R. at 1417] (February 2003 Privacy Act Release form); [R. at 1377] (June 2003 statement in support of claim). VA construed this as a Notice of Disagreement (NOD) on the issue of an initial rating as well as a claim for increased rating, and it increased Appellant's evaluation to 50 percent, effective February 2003, in a September 2003 rating decision. [R. at 1329–33]; *see also* [R. at 1342–47] (August 2003 VA PTSD examination).

Appellant then submitted a further claim for increase, along with a request for a total disability rating based on individual unemployability (TDIU), in October 2003. [R. at 1323–24]. A further increased rating of 70 percent, effective October 2003, was granted in a June 2004 rating decision. [R. at 1275–80]; *see also* [R. at 1288–91] (June 2004 VA PTSD examination). This rating decision also granted TDIU from the same date. [R. at 1278–79 (1275–80)].

Later in June 2004, Appellant filed a statement requesting a "total and permanent" 100 percent rating for his PTSD "from the beginning of [his] appeal" in the early nineties. [R. at 1236–40]. He appeared to argue that the agency did not previously consider the February 1994 report from Dr. Steuber, which he believed established his PTSD diagnosis. *See id.* VA issued a rating decision in September

2004 denying the claim for an increased rating and denying the request for an earlier effective date for the grant of service connection. [R. at 1194–99]. The RO explained that, as confirmed by the Board and the Court, Dr. Steuber's diagnosis was equivocal and PTSD was not confidently diagnosed until the March 11, 2000 examination by Dr. Barnes. [R. at 1198 (1194–99)]. Appellant appealed later that month, arguing that he "started [his] claim in 1993 and that [his] diagnosis from Dr. Steuber" should be considered sufficient to grant the claim from that date. [R. at 1189–90]; *see also* [R. at 1185] (October 2004 VA Form 9).

In a June 2005 rating decision, the RO increased Appellant's PTSD evaluation to 100 percent effective October 2003. [R. at 1116–20]. On the request for an earlier effective date for the grant of service connection, the RO issued an SOC, also in June 2005, denying the request. [R. at 997–1015]. Appellant perfected his appeal of this issue in July 2005. [R. at 993–94]. Because he submitted additional arguments and records shortly afterward, [R. at 973–92], the RO issued an SSOC the following month continuing the denial of benefits and addressing those records, [R. at 970–72].

In a July 2005 letter, Dr. Steuber clarified that his February 1994 examination report was intended to "definitely diagnosis [sic] Mr. Staggs with the diagnosis of [PTSD]." [R. at 967]; *see also* [R. at 2027] (February 2012 letter from Dr. Steuber, noting that he applied the DSM-III criteria in making his February 1994 diagnosis). The RO addressed the letter in a May 2006 SSOC, dismissing it as duplicate evidence that did not answer the problem originally identified: Dr. Steuber

did not provide a sufficiently clear diagnosis in 1994 that was consistent with the DSM-III criteria. *See* [R. at 936–37].

The Board issued a decision in January 2008. [R. at 832–34]. First, the Board determined that, based on Appellant's prior submissions, he never submitted an appeal as to the effective date for service connection for PTSD. [R. at 833 (832–34)]. Instead, he disputed the assigned initial and staged ratings only. *Id.* The Board remanded the claim for preparation of an SOC that addressed each rating period. [R. at 833–34 (832–34)].

The RO prepared the requested SOC in July 2008, carefully reviewing the evidence and providing reasons for the assignment of the initial rating of 30 percent from March 2000, the increased rating of 50 percent from February 2003, and the increased rating of 100 percent from October 2003. [R. at 748–89]. As part of this SOC, the RO canvassed the complex history of this disability and the record evidence, explaining the various treatment records, medical evaluations, administrative decisions, and Board and Court appeals. *See* [R. at 776–789 (748–89)]. Although the Board had instructed that the claim would be returned to it after preparation of the SOC, Appellant submitted a further substantive appeal in August 2008, again raising arguments in favor of an earlier effective date for the grant of service connection. [R. at 740–44]. The appeal was certified to the Board once more in October 2008. [R. at 738].

In this portion of the record are several screenshots captured from the Veterans Appeals Control and Locator System (VACOLS) which form a central

feature of Appellant's present appeal. VACOLS is an automated database designed to aid the agency in tracking appeals of denied claims, including actions taken on each appeal pending for a particular veteran. The system records basic information about each appeal and its status, such as whether the appeal has been initiated by NOD, whether an SOC or SSOC has been prepared, whether the appeal has been perfected, or whether it is presently on remand from the Board or the Court. *See* M21-1 Adjudication Procedures Manual, I.5.K (explaining the nature and purpose of VACOLS).

For instance, as relevant here, a VACOLS entry was created for Appellant's appeal of his PTSD claim. *See* [R. at 732]. Within that entry, a VA official entered information relating to the July 2008 SOC. [R. at 733]. That screen reflects a disposition of "benefits granted" and contains a note reading, "for PTSD from 1993." *Id.* Because the July 2008 SOC did not grant Appellant an effective date in 1993 for the award of service connection, it appears this notation refers not to a grant of benefits but to Appellant's argument in favor of the same. *See* [R. at 777 (748–89)] (noting that the RO performed a "longitudinal review of [the] claims folder" because it was "[Appellant's] contention that a 100 percent [sic] should be established for PTSD effective in March 1993").

Appellant gained access to this July 2008 VACOLS entry and came to the RO in person in November 2008 to inquire about it. [R. at 727] (November 2008 report of contact). He requested a "copy of his grant of appeal for an earlier effective date." *Id.* The service center representative noted that VACOLS showed

that benefits were granted for PTSD from 1993, but she decided to call the Appeals Management Center along with Appellant to seek clarification. *Id.* During the call, Appellant was advised that the entry related to the July 2008 SOC was created in error and that his appeal was still pending. *Id.*

In December 2008, Appellant wrote to Margaret Peake, the FOIA/privacy officer for the Board, asking for a copy of the July 2008 VACOLS entry. [R. at 714]. She obliged later that month. [R. at 710]. In a call to VA in December 2008, Appellant continued to express confusion why his benefits had not been granted as he requested. [R. at 702] (December 2008 report of contact).

The Board issued another decision concerning Appellant's PTSD in March 2010. [R. at 661–76]. On the issue of Appellant's request for an earlier effective date for service connection, the Board found that he had not timely appealed the effective date assigned in December 2002. [R. at 662–63 (661–76)]. His initial submissions following that rating decision all focused on the assigned initial and then staged ratings, saying nothing of the effective date for service connection. *Id.* Because he did not raise the issue of the effective date for service connection until June 2004, he missed the window to appeal that issue. *Id.* The Board notified him that the only way to pursue an earlier effective date under the circumstances was to file a request for revision of the December 2002 decision based on CUE. [R. at 663 (661–76)]. On the question of Appellant's initial and staged ratings, the Board, resolving reasonable doubt in Appellant's favor, determined that a 100 percent rating was warranted from the date of service connection, March 11, 2000. [R. at

664–76 (661–76)]. The RO effectuated this grant of benefits in an April 2010 rating decision. [R. at 655–59].

In a May 2010 letter, Appellant filed a motion for reconsideration of the March 2010 Board decision, stating that he was told by VA representatives that he "was granted benefits for an earlier effective date of 1993 because of new evidence with a date of 7/30/2008." [R. at 622–24]. He sought an effective date of February 24, 1994 for his award of service connection, based on Dr. Steuber's report from that month and in light of the doctor's July 2005 letter clarifying the nature of his statements in that report. *Id.* Appellant submitted the July 2008 VACOLS screenshot discussed previously. [R. at 617]. The Chairman of the Board denied the motion for reconsideration in August 2010. [R. at 604–05].

Appellant, through counsel, appealed the March 2010 Board decision and August 2010 decision on the motion for reconsideration to this Court. The Court affirmed by memorandum decision issued in January 2012. *Staggs v. Shinseki*, No. 10-2806, 2012 U.S. App. Vet. Claims LEXIS 154 (2012). After reviewing the long and complex history of this claim, the Court concluded that Appellant's June 2004 letter was the first time he had ever asserted that his award of service connection for PTSD should be made effective from 1993. *Id.* at *5. Because he did not timely appeal the effective date determination rendered in the December 2002 rating decision, the Court affirmed the Board's finding that the effective date for the award of service connection was not on appeal as of the March 2010 decision. *Id.* at *9. The Court noted that Appellant had not challenged the

December 2002 rating decision on CUE grounds, which remained the only viable route to overturning that decision. *See id.* at *9–10.

In a series of submissions in July and August 2012, Appellant filed a motion for revision of the December 2002 rating decision on the basis of CUE. [R. at 537–84]. In the motion, Appellant asserted error in many VA actions and decisions besides the December 2002 rating decision, including the March 1994 rating decision and the May 2006 SSOC, in addition to reiterating arguments made previously about the incorrectness of the effective date assigned in the December 2002 rating decision, such as the July 2008 VACOLS screenshot Appellant believes established his entitlement to benefits. *See* [R. at 568–76 (537–84)]. The RO denied Appellant's request in an August 2012 rating decision. [R. at 378–85].

Appellant submitted additional documents supporting his request on the same day as the RO issued its decision. [R. at 348–58]; *see also* [R. at 308] (January 2013 letter from Appellant). The RO issued another decision in July 2013 continuing the denial of the CUE motion. [R. at 210–14]. Appellant submitted an NOD in September 2013, [R. at 189–98], and VA issued an SOC in March 2015 continuing the denial of the motion, [R. at 93–110]. Appellant perfected his appeal in April 2015. [R. at 82–90].

The Board issued the decision under review in July 2017. [R. at 5–11]. The Board first reviewed the procedural history of the underlying PTSD claim, noting that the effective date for service connection assigned in December 2002 became final because Appellant did not appeal that issue. [R. at 8–9 (5–11)]. The Board

next determined that Appellant allegations of CUE were without merit, observing that many of his allegations pertained to irrelevant decisions and actions of the agency which did not demonstrate that the RO in December 2002 committed clear error. [R. at 9–10 (5–11)]. Further, said the Board, it could not question any agency decision taken prior to Appellant's unsuccessful appeal of the May 1996 Board decision, as that decision was affirmed by the Court. *Id.* As to the December 2002 rating decision itself, the Board pointed out that Dr. Steuber's 2005 clarifying letter could not demonstrate clear error in the RO's decision-making from three years prior. [R. at 10 (5–11)]. Concluding that none of Appellant's arguments provided actual reasons that the agency failed to review the correct record or misapplied the law in December 2002, the Board denied the CUE motion. *Id.*

Later in July 2017, Appellant filed a motion for reconsideration of the July 2017 Board decision. Appx. at 3–7. The Chairman denied the motion in February 2019. *Id.* at 1–2. The Chairman found that Appellant had not demonstrated that the Board's July 2017 decision contained an obvious error of fact or law. *Id.* Instead, Appellant rehashed arguments previously made to the Board. *Id.* Further, the purportedly new evidence he submitted with his motion, including the July 2008 VACOLS screenshot, was not new, as he had previously submitted it to VA. *Id.*

Appellant filed a notice of appeal in this Court on April 10, 2019.

III. SUMMARY OF THE ARGUMENT

Appellant appears to believe that a screenshot from VACOLS reflecting the date "1993" within an entry related to his PTSD claim entitles him to service

connection from that date. It does not. That document, which he has submitted to the agency several times before, is of no import whatsoever. Instead, his claim for benefits is governed by the decisions of VA's designated adjudicators, such as the Board and, as relevant here, the RO in its unappealed December 2002 rating decision. Other than repeating this same mistaken assertion to the Court, Appellant offers no reason to question the Board's thoroughly reasoned decision on his CUE motion.

Moreover, to the extent Appellant takes exception to the Chairman's denial of his motion for reconsideration, his argument fares even worse. This Court has extremely limited authority to review the merits of a denial of a motion for reconsideration of a Board decision. Appellant's arguments to the Chairman, which allege only that Board committed material errors of fact or law based on the record presented to the Board, do not successfully tread the narrow paths for Court review of the Chairman's ruling.

IV. ARGUMENT

A. The Board Was Under No Obligation to Consider the Irrelevant VACOLS Entry from July 2008 in Deciding Appellant's CUE Motion.

Appellant argues that the Board erred in denying his CUE motion because, in his view, the July 2008 VACOLS entry reflects an award of service connection

for PTSD dating to 1993. App. Br. at 1–2. It appears that he thinks this finding consistent with Dr. Steuber's 1994 diagnosis. *See id.* at 1, 3.[2]

In reviewing a Board decision for adequacy, the Court will only overturn the Board's factual determinations if clearly erroneous. 38 U.S.C. § 7261(a)(4); *Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997). Even if the Court might have reached a different conclusion, the Board's findings of fact must stand if there exists a plausible basis in the record to support them. *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990). Additionally, a Board decision must contain a statement of reasons or bases on all material issues of fact and law presented in the record, sufficient to enable a claimant to understand the precise basis for the Board's decision as well as to facilitate review by the Court. 38 U.S.C. § 7104(d)(1); *Gilbert*, 1 Vet.App. at 56–57.

The Board's obligation to address the law and the record evidence is not limitless, however. Instead, the Board must address only those facts and provisions of law that are material to its decision or are favorable to the claimant's position. *Gilbert*, 1 Vet.App. at 56–57; *Dela Cruz v. Principi*, 15 Vet.App. 143, 149 (2001) (finding that while the Board is not required to discuss all the evidence of record, it must explain its rejection of favorable evidence). Since the Court's

[2]Appellant made the same arguments to the Chairman of the Board. Appx. at 3–7. Because of the special rules limiting the Court's power to review the Chairman's ruling on the motion for reconsideration, the Secretary will first explain why the Board's underlying decision is free from error. This will set the stage for the next Part, in which the Secretary will show why the Court cannot entertain Appellant's challenges to the Chairman's denial of his motion for reconsideration.

inception, it has recognized that the Board need address only the law and the facts that are "potentially applicable" to the issues before the agency. *Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991).

In accordance with these principles, the Board did not err in failing to address Appellant's contention based on the July 2008 VACOLS entry. Despite Appellant's belief to the contrary, a VACOLS entry cannot award him benefits. VACOLS is a software program internal to the agency which aids in recording information about a claimant's appeals, but it is not a part of the adjudication process itself. A claimant's right to disability compensation benefits is instead adjudicated through rating decisions and, if those are appealed, through decisions of the Board.[3] The VACOLS entry from July 2008, not being a meaningful part of the process of adjudicating Appellant's right to benefits for PTSD, was not "potentially applicable" to the CUE motion in any sense. *Id.* It did not warrant discussion, nor is it a "documented" grant of benefits which VA has failed to "honor." App. Br. at 2–3.

What's more, VA dispelled Appellant's misapprehension of the July 2008 VACOLS entry years ago, in November 2008, when he came to the RO to ask

[3]An application for disability compensation benefits is adjudicated in the first instance by the Veterans Benefits Administration (VBA). 38 U.S.C. §§ 7701, 7703(1) (establishing the VBA and giving it responsibility for, among other things, administering compensation programs). This is typically done by one of the VBA's ROs. *See Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 419 F.3d 1317, 1318 (Fed. Cir. 2005). The VBA, including its ROs, is distinct from the Board. 38 U.S.C. §§ 301(c)(5) (identifying the Board as an entity separate from the VBA), 7101(a) (establishing the Board). A claimant dissatisfied with a decision from the VBA can appeal to the Board, which renders the Secretary's final decision on the claim. 38 U.S.C. §§ 7104(a), 7105.

about it. [R. at 727] (November 2008 report of contact). Why he continues to harbor a mistaken belief that he was awarded a 1993 effective date in July 2008 is not clear.

Further, the only adjudicative document in Appellant's claims file bearing a July 2008 date is the SOC issued that month. Whatever the VACOLS database might show, an SOC cannot award benefits to a claimant. Instead, it is prepared in precisely the opposite circumstance—when benefits are denied. *See* 38 U.S.C. § 7105(d). An SOC summarizes the law and the facts applicable to the claim to explain to the claimant the reason for the denial. *Id.* If the claimant remains aggrieved after receipt of the SOC, he can perfect his appeal to the Board. *Id.*; 38 C.F.R. § 20.202. In the end, no matter how one views the July 2008 VACOLS entry or the accompanying July 2008 SOC, it is impossible to conclude that they are relevant to Appellant's CUE motion that collaterally attacks the finality of a December 2002 rating decision or that they establish entitlement to a 1993 effective date for service connection for PTSD. *Gilbert*, 1 Vet.App. at 56–57; *Dela Cruz*, 15 Vet.App. at 149.

Indeed, for this reason, even if the Court concluded that the Board should have addressed Appellant's contentions regarding the VACOLS entry, his appeal fails for lack of prejudice. 38 U.S.C. § 7261(b)(2); *Soyini v. Derwinski*, 1 Vet.App. 540, 546 (1991) (although the rules-and-bases duty normally requires "strict adherence," such "strict adherence does not dictate an unquestioning, blind adherence in the face of overwhelming evidence in support of the result in a

particular case"); *Winters v. West*, 12 Vet.App. 203, 207 (1999) (even when an error has been committed, the Court "need not—indeed must not—vacate or reverse the BVA decision if it is clear that the claimant would have been unsuccessful irrespective of the error"), *rev'd on other grounds*, 219 F.3d 1375 (Fed. Cir. 2000); *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (the appellant bears the burden to show "whether the result would have been different had the [Board's] error not occurred"). Because Appellant's right to an earlier effective date was not and cannot have been determined by an entry in a VA computer database or through an SOC, both dated nearly six years after the December 2002 rating decision that is the subject of the CUE challenge, remand for consideration of his theory concerning this evidence would inure to no one's benefit. *Soyini*, 1 Vet.App. at 546 (holding that in the absence of prejudicial error, remand to the Board "would result in this Court's unnecessarily imposing additional burdens on the BVA and DVA with no benefit flowing to the veteran. This we cannot do.").

Appellant raises no other contentions with respect to the Board's decision on his CUE motion. Although *pro se* filings are read generously, even a *pro se* appellant must assert with "some particularity the allegation of error so that the Court is able to review and assess the validity of [his] arguments." *Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006), *rev'd on other grounds sub nom.*, *Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008). In the absence of some credible argument that the Board erred in a decision, a veteran cannot carry his burden to demonstrate error on appeal. *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en

banc), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000). Without further cogent assertions of error to review, the Court should affirm the Board's decision.

Even were the Court to review the Board's decision despite the lack of alleged error, it passes muster. The Board correctly concluded that, notwithstanding Appellant's myriad complaints concerning VA's actions throughout the course of the proceedings related to his PTSD, he nowhere identified facts of record that the RO failed to consider or law that it misapplied in its December 2002 rating decision. Having not tied his arguments to the relevant and onerous standards for a collateral attack on a rating decision, *see* 38 C.F.R. § 3.105, the Board reasonably concluded that Appellant failed to establish CUE.[4]

The Board's decision denying Appellant's CUE motion rests on fulsome consideration of the pertinent law and record evidence. It should be affirmed.

B. Appellant's Arguments in His Motion for Reconsideration Take the Motion and the Ruling Outside the Court's Jurisdiction.

Although Appellant's informal brief does not clearly indicate that he is appealing the Chairman's denial of his motion for reconsideration as to the July

[4]As the Board observed, to the extent Appellant challenges any agency decisions predating his January 1999 claim to reopen, his arguments are foreclosed by the finality of the Court's early 1999 decisions, which he did not appeal. 38 U.S.C. § 7291. Put simply, Appellant can never re-enter the claim stream pre-dating his January 1999 claim to reopen, as the Court conclusively determined that claims prior to this date were correctly denied. At earliest, he could claim an effective date for service connection of January 1999, but he has not done so and his submissions give no reason to doubt the validity of the March 2000 effective date, which was based on Dr. Barnes' psychological evaluation and the lack of clarity in the medical evidence prior to Dr. Barnes' assessment.

2017 Board decision, *Coker*, 19 Vet.App. at 442, such a challenge would be without merit in any event. Review of Board decisions in this Court is confined to "the record of proceedings before the Secretary and the Board." 38 U.S.C. § 7252(b). In *Rogozinski v. Derwinski*, 1 Vet.App. 19, 20 (1990), the Court held that, under this statute, it has no jurisdiction to include in the Record Before the Agency any materials that were not originally part of the record of proceedings before the Secretary and the Board. *See also Gabrielson v. Brown*, 7 Vet.App. 36, 41–42 (1994). This would exclude motions for reconsideration and the rulings on them, since both necessarily post-date the Board's decision. In circumstances where the timeliness of an appeal must be calculated by reference to a motion for reconsideration and the ruling thereon, as provided in *Rosler v. Derwinski*, 1 Vet.App. 241, 249 (1991), such motions and rulings may be included in a supplemental record solely for that purpose, *see Bennett v. Brown*, 10 Vet.App. 178, 181 (1997).[5]

The Court's jurisdiction to review the merits of a ruling on a motion for reconsideration is extremely limited. *See id.* at 182. Such review is only undertaken where the veteran submits "new evidence" with his reconsideration motion in the

[5]On this point, the record reveals that Appellant's appeal to this Court is timely in light of his motion for reconsideration. The Board issued its decision on July 6, 2017; Appellant filed his motion on July 19, 2017; the Chairman issued his ruling on the motion on February 12, 2019; and Appellant timely appealed from that ruling to this Court on April 10, 2019. *See Rosler*, 1 Vet.App. at 249 (holding that a veteran has 120 days to file a motion for reconsideration, and then a new 120-day period to appeal to the Court from the denial of the motion).

form of service department records, or shows that "changed circumstances" between the Board's decision and the Chairman's ruling warranted a grant of reconsideration. *Romero v. Brown*, 6 Vet.App. 410, 413 (1994). When the motion for reconsideration merely requests that the Chairman review the Board decision for material errors of fact or law on the same record the Board considered, the Court will decline to review the denial. *Patterson v. Brown*, 5 Vet.App. 362, 365 (1993) ("'[T]he agency's refusal to go back over ploughed ground is nonreviewable.'") (quoting *I.C.C. v. Locomotive Engineers*, 482 U.S. 270, 284 (1987)).

Appellant's motion for reconsideration satisfies neither of the two narrow exceptions to the unreviewability of reconsideration rulings. First, Appellant submitted no service department records with his motion. *See* Appx. at 3–7. Moreover, none of the evidence he did provide was "new" since, as the Chairman observed, VA had received that evidence previously. *Romero*, 6 Vet.App. at 413 (holding that "new" evidence cannot be cumulative of the other evidence of record) (citing *Cox v. Brown*, 5 Vet.App. 95, 98 (1993)). Appellant concedes as much. App. Br. at 1 (noting that Appellant submitted evidence concerning the VACOLS entry and Dr. Steuber's 1994 diagnosis "several times").

Second, Appellant offers no reason to suspect that changed circumstances warranted the Chairman's granting his motion. *Romero*, 6 Vet.App. at 413. Instead, Appellant presented to the Chairman the same meritless arguments and evidence he offered to the Board. Appellant's request that the Chairman review the Board

decision for material errors of fact and law, based on the same facts the Board considered, is just the sort of reconsideration motion *Patterson* held to be non-reviewable. *Patterson*, 5 Vet.App. at 365. As a result, the Court should decline to review the Chairman's ruling denying Appellant's motion for reconsideration.

V. CONCLUSION

For the foregoing reasons, Appellee respectfully submits that the July 6, 2017 decision of the Board should be affirmed in all respects, and the Court should decline to review the February 12, 2019 ruling of the Chairman of the Board on Appellant's motion for reconsideration.

Respectfully submitted,

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Joan E. Moriarty
JOAN E. MORIARTY
Deputy Chief Counsel

/s/ Christopher Bader
CHRISTOPHER BADER
Appellate Attorney
Office of the General Counsel (027C)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6877

APPENDIX

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

February 12, 2019

In Reply Refer To: O1C2
C
STAGGS, Sam R.

Mr. Sam R. Staggs
P.O. BOX 64
Buffalo Valley, TN 38548

Ruling on Motion

Dear Mr. Staggs:

This letter responds to your Motion for Reconsideration of the Board of Veterans' Appeals (Board) decision of July 6, 2017. The Motion was postmarked by the United States Postal Service on July 14, 2017, and received at the Board on July 19, 2017. 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 his 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. I will consider your Motion under both the theory that the Board committed an obvious error of fact or law (38 C.F.R. § 20.1000(a)) and that you have submitted new and material evidence (38 C.F.R. § 20.1000(b)).

The Chairman, or his 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.

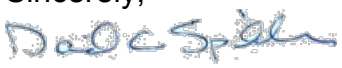
Your Motion reflects that you disagree with the Board's decision in this claim, but you do not identify any error in the Board's application of the law to the facts in denying your claim for clear and unmistakable error in a December 2002 regional office rating decision. It appears that you disagree with how the Board decided this claim as you reiterate your contention, as discussed in the Board's decision, that you should have been granted an earlier effective date. While you make clear that you disagree with the Board's decision in this claim, your Motion 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.

The additional evidence submitted with your Motion has been associated with your claims file. As stated above, under 38 C.F.R. § 20.1000(b), new and material evidence may warrant reconsideration. However, the December 31, 2008 letter you submitted was of record prior at the time of the Board decision, and therefore cannot be deemed new as contemplated by the provisions of 38 C.F.R. § 20.1000(b). For these reasons, your Motion for Reconsideration is denied.

I hope this information is helpful to you.

Sincerely,



David C. Spickler
Vice Chairman
Board of Veterans' Appeals

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

cc: Tennessee Department of Veterans Affairs

SAM RAY STAGGS CLAIM # Date 07/14/2017

MOTION FOR RECONSIDERATION

There is a clear and unmistakable error, (CUE), in the December 2002 rating decision that granted service connection for posttraumatic stress disorder with an effective date of March 11, 2000.

The CUE is that the outcome of the 2002 rating decision would have been different. The outcome would have granted me a new Effective Date of my claim back to the year 1993, as shown in the entry into the V.A.'s tracking system, (VACOLS).

This (VACOLS) entry is shown on a letter that I received from Margaret L. Peak, (FOIS/Privacy Act Officer), dated December 31, 2008.

I have submitted the letter from Margaret Peak dated December 31, 2008 and a copy of the (VACOLS) screen shot dated July 30, 2008 several times but, I get no response from the V.A. concerning it.

I did not receive any Benefits from this Disposition dated 7/30/2008.

Please find attached, Margaret Peak's letter, a copy of the entry of the (VACOLS) screen itself and Dr. Steuber's letter dated February 24, 1994.

Please make corrections to my Effective Date from (March 11, 2000) to the new Effective Date of ((February 24, 1994)/year 1993)) and give me the benefits that were granted to me as designated in the July 30, 2008 (VACOLS). I started therapy with Dr. Steuber in December of 1993.

cc: Honorable Congressman Diane Black

Thank you,

Sam R. Staggs

Sam R. Staggs

DEPARTMENT OF VETERANS AFFAIRS
Board of Veterans' Appeals
Washington DC 20420

In Reply Refer To (01C1)

December 31, 2008

Sam R Staggs
5421 Medley Amonette RD.
Buffalo Valley, TN 38548

Dear Sam R Staggs:

This is in response to your correspondence of December 19, 2008, which was received in this office on December 19, 2008. In your letter you requested a copy of the VACOLS screen of the entry made on July 30, 2008 in VACOLS.

Enclosed please find a copy of the VACOLS screen you requested.

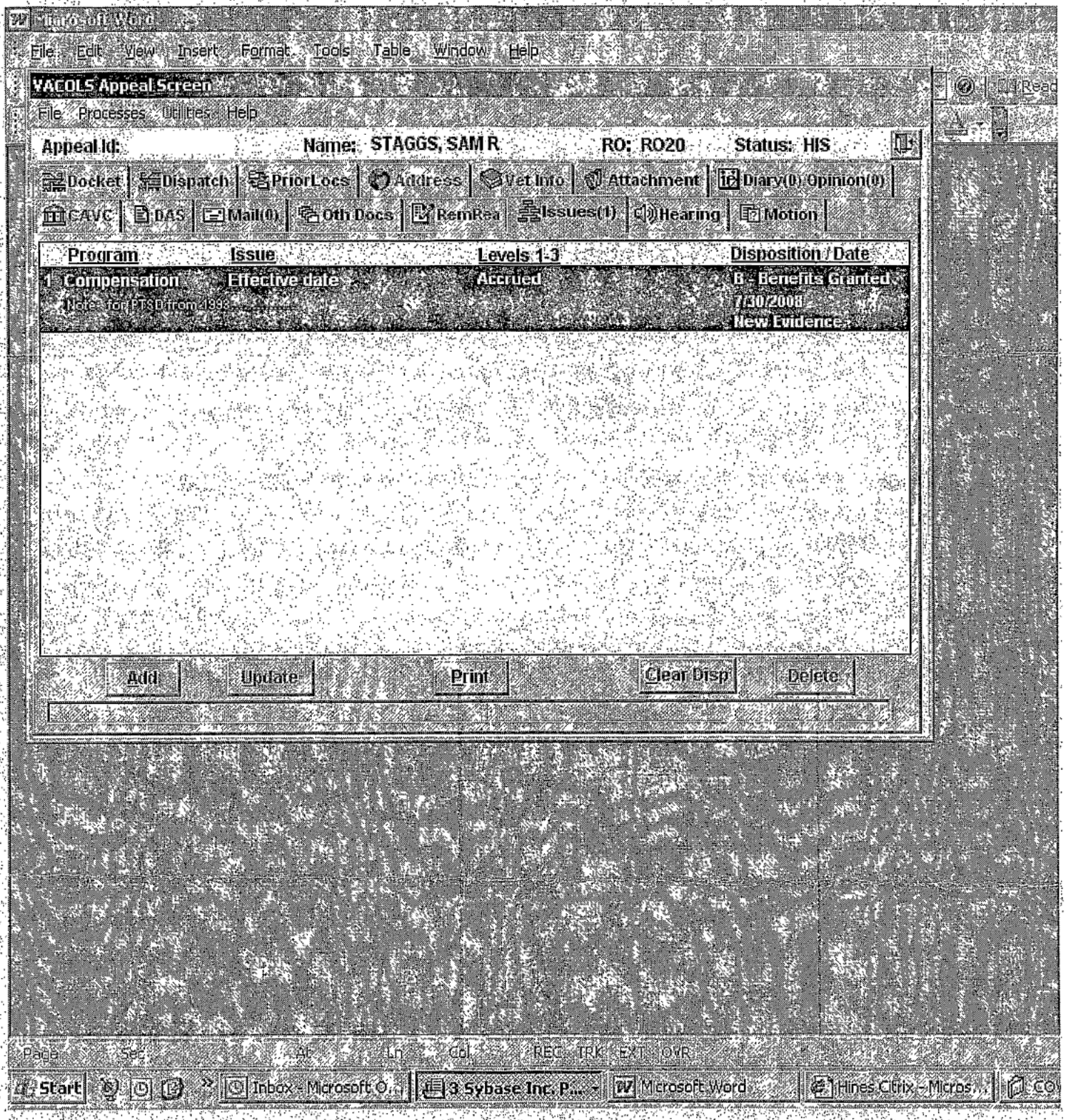
If you consider this response to be a denial of any part of your request, you have the right to administratively appeal this decision, in writing, to the Office of General Counsel (024), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. An appeal must include your VA file number and state clearly why you disagree with the determination of this office. If you wish to request additional records or clarification, please write directly to this office.

Sincerely,

for L. Cooke

Margaret L. Peak
FOIA/Privacy Act Officer

Enclosure:


File Edit View Insert Format Tools Table Window Help
VACOLS Appeal Screen
File Processes Utilities Help
Appeal Id: Name: STAGGS, SAM R RO: RO20 Status: HIS
Docket Dispatch PriorLocs Address Vet Info Attachment Diary(0) Opinion(0)
CAVC DAS Mail(0) Oth Docs RemRea Issues(1) Hearing Motion
Program Issue Levels 1-3 Disposition / Date
1 Compensation Effective date Accrued B - Benefits Granted
Note: for PTSD from 1998 7/30/2008
New Evidence
Add Update Print Clear Disp Delete
Page Sec At Ln Col REC TRK EXT OVR
Start Inbox - Microsoft O... 3 Sybase Inc. P... Microsoft Word Hines Citrix - Micros...

SAM R. STAGGS CLAIM #

DATE 07/18/2017

THE GUIDANCE CENTER

MURFREESBORO OFFICE:
P.O. Box 1559
118 North Church Street
Murfreesboro, TN 37133-1559
(615) 893-0770

SMYRNA OFFICE:
240 Mayfield Drive - Suite 205
Mayfield Office Center
Smyrna, TN 37167
(615) 459-9251

February 24, 1994

Re: Sam Ray Staggs

To Whom It May Concern:

DEC 1993*

I have seen Mr. Staggs in individual psychotherapy for the past month and a half and have access to his record of treatment here at the Guidance Center during the past several months. It seems abundantly clear to me that this man is exhibiting symptoms congruent with the diagnosis of Post Traumatic Stress Disorder. Today he came to my office for his appointment and informed me that he had quit his job. He was extremely agitated with a great deal of anger and anxiety apparent. He said that, "it was really over nothing. I just "blew up" as I have done so many times in the past".

Mr. Staggs relates that he was popular and well liked throughout high school and that he has not been able to regain that personality since going to Vietnam. While in Vietnam he relates witnessing many children who had been severely injured by bombings. These children were "dragging themselves around with limbs missing and gaping wounds". He also relates that he often witnessed orphan children eating from the unit garbage bins.

He relates that, when waiting to come home for a two week leave, a pilot over the air field had to parachute out, however his parachute didn't open and he hit the roof of the building in which they were waiting. They went outside and saw him dead and enmeshed in the fencing around the air field. He relates another incident when he was company clerk and he was returning to the unit and there was a bombing in which his friend was hit with shrapnel and died in his arms before the medics could arrive. He also mentioned being caught in the middle of the jungle when bringing back supplies to the unit. He and a comrade from Hawaii were pinned down all during the night. He remembers holding this other soldier in his arms to comfort him and to keep him from crying loudly enough to alert the enemy.

It is my feeling that Mr. Staggs is unable to deal with the everyday stress of the average employment and this is pretty well documented by his many different jobs in the past few years. I believe that he is in need of treatment for the depressive and anxiety symptoms

SAM RAY STAGGS CLAIM#

DATE: 07/14/2017

2 of 8

currently exhibited; and strongly suspect that this condition was precipitated by the emotional trauma experienced during his tour of duty in Vietnam.

Sincerely yours,

Harry Steuber

Harry B. Steuber, Ph.D.
Licensed Clinical Psychologist

klp

CERTIFICATE OF SERVICE

On November 18, 2019, a copy of the foregoing was mailed postage prepaid to:

Sam Ray Staggs
P.O. Box 64
Buffalo Valley, TB 38548

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Christopher Bader
CHRISTOPHER BADER
Appellate Attorney
Office of the General Counsel (027C)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6877