

JERRY J. JENNINGS
1132 BELLFLOWER RD
AKRON, OH 44307-1318



BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: March 26, 2019

SS [REDACTED]

JERRY J. JENNINGS
1132 BELLFLOWER RD
AKRON, OH 44307-1318

Dear Appellant:

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

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

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

Sincerely yours,

K. Osborne
Deputy Vice Chairman

Enclosures (1)
CC: Disabled American Veterans

Disabled American Veterans
3725 Alexandra Pike
Cold Springs, KY 41076



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BOARD OF VETERANS' APPEALS

DEPARTMENT OF VETERANS AFFAIRS

IN THE APPEAL OF
JERRY J. JENNINGS
REPRESENTED BY
Disabled American Veterans

SS [REDACTED]
Docket No. 16-53 548A
Advanced on the Docket

DATE: March 26, 2019

ORDER

Service connection for thoracolumbar spine arthritis is granted.

Service connection for left ankle sprain is granted.

Service connection for right ankle sprain is granted.

REMANDED

Service connection for cervical spine arthritis is remanded.

FINDINGS OF FACT

1. The Veteran's thoracolumbar spine arthritis had its onset in service.
2. The evidence clearly and unmistakably shows that the Veteran's bilateral ankle sprains pre-existed service.
3. The evidence does not clearly and unmistakably show that the Veteran's bilateral ankle sprains were not aggravated by service.

CONCLUSIONS OF LAW

1. The criteria of service connection for thoracolumbar spine arthritis have been met. 38 U.S.C. §§ 1110, 5107; 38 C.F.R. §§ 3.102, 3.303(a).
2. The criteria of service connection for left ankle sprain have been met. 38 U.S.C. 1110, 1111, 5107; 38 C.F.R. §§ 3.303, 3.304.
3. The criteria of service connection for right ankle sprain have been met. 38 U.S.C. 1110, 1111, 5107; 38 C.F.R. §§ 3.303, 3.304.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty in the United States Army from January 1972 to January 1974.

This matter comes before the Board of Veterans' Appeals (Board) on appeal from an October 2012 rating decision from the Department of Veterans Affairs (VA) Regional Office (RO). The Veteran presented sworn testimony at a hearing before the undersigned Veterans Law Judge (VLJ) in March 2019.

Service Connection

Service connection may be granted for a disability resulting in a disease or injury that is incurred in or aggravated by active military service. 38 U.S.C. §1110; 38 U.S.C. §3.303. To establish service connection for the claimed disorder, the following criteria must be met: (1) evidence of a current disability; (2) evidence of an in-service incurrence or aggravation of a disease or injury; and (3) evidence of a nexus between the claimed in-service disease or injury and current disability. *See* 38 C.F.R. § 3.303; *see also Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004); *Hickson v. West*, 12 Vet. App. 247, 253 (1999).

Thoracolumbar spine

All three elements of service connection are established by the competent and credible lay and medical evidence of record. 38 U.S.C. §§ 1110, 1131; 38 C.F.R. § 3.303; *Shedden*, 381 F.3d at 1166-67. The Veteran has a diagnosis of thoracolumbar spine arthritis. The service treatment records show that the Veteran was found to be normal at service entry and received significant treatment for his low back problems in-service. At separation, he endorsed recurrent back pain. Further, he reports ongoing back problems since service, which is consistent with the lay and medical evidence of record. The Veteran's account of recurrent back problems since service is both competent and credible. The Veteran's statements are entitled to probative weight, as they are internally consistent and consistent with the evidence of record, showing that the Veteran had numerous complaints of back pain as the result of an in-service injury. *See Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007).

Bilateral ankle sprain

The Veteran has bilateral ankle sprains. *See* September 2012 VA examination. The December 1971 entrance examination does not contain any notations as to any bilateral ankle disabilities. However, that Veteran has consistently reported that he sprained his ankles prior to service. A veteran is presumed sound except as to defect, infirmities, or disorders noted at entry or where there is clear and unmistakable evidence demonstrating that an injury or disease existed prior to service and was not aggravated by service. 38 U.S.C. § 1132; 38 C.F.R. § 3.304(b).

Here, VA cannot presume that, at service entry, the Veteran was not sound with respect to his bilateral ankle sprains. Although, this injury pre-existed service, the Veteran does not report any bilateral ankle problems or pain prior to service. While in service, he repeatedly sought treatment for his bilateral ankle strains. *See* February 1972 – March 1973 service treatment records. Service treatment records also show that he ankle laxity and was placed on a profile. Thus, consistent with the Veteran's statements, the medical evidence clearly and unmistakably shows that his bilateral ankle sprains existed prior to service. The medical evidence, however, does not clearly and unmistakably reflect that the disability was not aggravated by

such service. Thus, because he was normal at service entrance with respect to this disability, and since the evidence does not clearly and unmistakably show that his bilateral ankle sprains both existed prior to service and were not aggravated by service, the criteria for service connection have been met.

REASONS FOR REMAND

Cervical spine

At his September 2012 VA examination, the Veteran detailed that he experienced neck pain in service following a car accident in 1973. He reports refusing treatment for his neck. The September 2012 VA examiner concludes that the Veteran's current cervical disability is not related to service because it is related to his post-service fall off a ladder in 1981. This conclusion fails to account for the Veteran's contentions that he first experienced neck pain in 1973. As a result, an addendum opinion is necessary.

The matter is REMANDED for the following action:

1. Obtain any outstanding VA treatment records.
2. Notify the Veteran that he may submit lay statements from himself and from other individuals who have first-hand knowledge, and/or were contemporaneously informed of in-service and post-service neck problems. The Veteran should be provided an appropriate amount of time to submit this lay evidence.
3. Afford the Veteran a VA examination that addresses his lay statements about experiencing neck pain in-service after a 1973 motor vehicle accident.

The opinion should discuss whether it is at least as likely as not that any current disability had its onset in service or is otherwise related to service.

IN THE APPEAL OF
JERRY J. JENNINGS

SS [REDACTED]
Docket No. 16-53 548A

To the extent the conclusion relies on the absence of treatment in service, the examiner should explain the medical significance of lack of treatment in service in reaching his/her conclusion. |



STEVEN D. REISS
Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD

K.Ijitimehin, Associate Counsel

YOUR RIGHTS TO APPEAL OUR DECISION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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