



**BOARD OF VETERANS' APPEALS**  
**FOR THE SECRETARY OF VETERANS AFFAIRS**

IN THE APPEAL OF  
**CHARLIE G. JOHNSON**  
REPRESENTED BY  
**The American Legion**

**[REDACTED]**  
Docket No. 18-49 280  
**Advanced on the Docket**

DATE: May 14, 2019

**ORDER**

Entitlement to a disability rating in excess of 20 percent for duodenal ulcer is denied.

**FINDING OF FACT**

The most probative evidence of record does not demonstrate that the Veteran's duodenal ulcer is moderately severe, defined as less than severe but with impairment of health manifested by anemia and weight loss; or recurrent incapacitating episodes averaging 10 days or more in duration at least four or more times a year.

**CONCLUSION OF LAW**

The criteria for entitlement to a disability rating in excess of 20 percent for duodenal ulcer have not been met. 38 U.S.C. §§ 1155, 5103A, 5107(b); 38 C.F.R. §§ 3.102, 4.3, 4.7, 4.114, Diagnostic Code 7305.

**REASONS AND BASES FOR FINDING AND CONCLUSION**

The Veteran served on active duty from July 1971 to July 1991.

This matter comes before the Board of Veterans' Appeals (Board) on appeal of an August 2017 rating decision by a Department of Veterans Affairs (VA) Regional Office (RO).

The Board is cognizant of the ruling of the United States Court of Appeals for Veterans Claims (Court) in *Rice v. Shinseki*, 22 Vet. App. 447 (2009). In *Rice*, the Court held that a claim for a total rating based on individual unemployability (TDIU) due to service-connected disability, either expressly raised by the Veteran or reasonably raised by the record, involves an attempt to obtain an appropriate rating for a disability and is part of the claim for an increased rating. In this case, the Veteran has not argued, and the record does not otherwise reflect, that the disability at issue renders him unemployable. Accordingly, the Board concludes that a claim for TDIU has not been raised.

## **1. Entitlement to an Increased Rating for Duodenal Ulcer**

### *Increased Ratings – General Legal Criteria*

Disability ratings are determined by the application of VA's Schedule for Rating Disabilities (Schedule), which is based on the average impairment of earning capacity. Separate diagnostic codes identify the various disabilities. 38 U.S.C. § 1155; 38 C.F.R. Part 4. Pertinent regulations do not require that all cases show all findings specified by the Schedule, but that findings sufficient to identify the disease and the resulting disability and, above all, coordination of the rating with impairment of function will be expected in all cases. 38 C.F.R. § 4.21; *see also Mauerhan v. Principi*, 16 Vet. App. 436 (2002).

When after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding the degree of disability such doubt will be resolved in favor of the claimant. 38 C.F.R. § 4.3. Where there is a question as to which of two ratings shall be applied, the higher rating will be assigned if the disability picture more nearly approximates the criteria required for that rating. Otherwise, the lower rating will be assigned. 38 C.F.R. § 4.7.

The Board will consider whether separate ratings may be assigned for separate periods of time based on facts found, a practice known as “staged ratings,” in all claims for increased ratings. *Fenderson v. West*, 12 Vet. App. 119, 126-27 (1999).

*Analysis*

The Veteran seeks a higher rating for his service-connected duodenal ulcer. The Veteran’s service-connected duodenal ulcer is rated as 20 percent disabling under 38 C.F.R. § 4.114, Diagnostic Code 7305. The Veteran’s increased rating claim was received on June 20, 2017. Therefore, the relevant rating period is from June 21, 2016, one year prior to receipt of the claim, through the present. *See* 38 C.F.R. § 3.400 (o) (2).

Under Diagnostic Code 7305, a 20 percent rating is warranted for moderate duodenal ulcer, manifested by recurring episodes of severe symptoms two or three times a year averaging 10 days in duration, or with continuous moderate manifestations. A 40 percent rating is warranted for moderately severe duodenal ulcer, defined as less than severe but with impairment of health manifested by anemia and weight loss; or recurrent incapacitating episodes averaging 10 days or more in duration at least four or more times a year. A maximum schedular rating of 60 percent is warranted for severe duodenal ulcer, with symptoms consisting of pain only partially relieved by standard ulcer therapy, periodic vomiting, recurrent hematemesis or melena, and manifestations of anemia and weight loss productive of definite impairment of health

Words such as “mild,” “moderate,” “moderately severe,” and “severe” are not defined in the Rating Schedule or in the regulations. Consequently, the Board must evaluate all of the evidence to ensure that its decisions are “equitable and just.” 38 C.F.R. § 4.6.

Ratings under diagnostic codes 7301 to 7329, inclusive, 7331, 7342, and 7345 to 7348 inclusive will not be combined with each other. 38 C.F.R. § 4.114. A single evaluation will be assigned under the diagnostic code which reflects the predominant disability picture, with elevation to the next higher evaluation where the severity of the overall disability warrants such elevation. *Id.*

Turning to the relevant evidence of record, the Veteran was provided a VA examination in July 2017. The VA examiner reviewed the record, interviewed the Veteran and conducted an in-person examination. The Veteran reported he has “vomiting,” described as regurgitation, fifteen to twenty minutes after meals. The Veteran further reported abdominal pain with burning two or three times a week. Additionally, the Veteran’s treatment plan includes taking continuous medication for his service-connected duodenal ulcer. Upon examination, the VA examiner noted the Veteran had recurring episodes of symptoms that are not severe, four or more times per year that last less than one day. The Veteran reported continuous abdominal pain that is only partially relieved by standard ulcer therapy. The Veteran further reported periodic nausea and vomiting that occur four or more times per year. The Veteran did not report any incapacitating episodes or other conditions related to his duodenal ulcer.

An April 2018 private examination report reflects that the Veteran complained of constant nausea and gagging, abdominal burning, random spitting up blood, abdominal pain and associated reflux.

The Veteran was provided a VA examination in June 2018. The VA examiner reviewed the record, interviewed the Veteran and conducted an in-person examination. The Veteran reported that he easily gets full followed by vomiting. He also reported blood in his stool and that he usually weighs between 195-197 pounds. The Veteran denied weakness or fatigue. The VA examiner noted that the Veteran has recurring episodes of symptoms that are not severe that occur four or more times per year and last less than one day. The Veteran reported abdominal pain that occurs at least monthly and recurrent vomiting that occurs four or more times per year for less than one day. The Veteran further reported four or more episodes per year of recurrent hematemesis and recurrent melena that last less than one day per episode. The Veteran did not report any incapacitating episodes or other conditions related to his service-connected duodenal ulcer. The VA examiner reported that the Veteran’s duodenal ulcer does not impact his ability to work.

Having reviewed the complete record, the Board finds that the evidence does not support the criteria for a disability rating in excess of 20 percent during the period on appeal for duodenal ulcer under Diagnostic Code 7305. The record shows that

the Veteran's duodenal ulcer has been manifested by non-severe recurrent episodes of symptoms of abdominal pain, vomiting, nausea, hematemesis, and melena. There is no showing, however, of moderately severe duodenal ulcer, defined as less than severe but with impairment of health manifested by anemia and weight loss. The Board also notes that recurrent incapacitating episodes averaging 10 days or more in duration at least four or more times a year are not shown. In light of the lack of evidence demonstrating any incapacitating episodes for his duodenal ulcer, the Board finds that the criteria for a rating of 40 percent for duodenal ulcer on this basis are also not met.

In light of the above, the preponderance of the evidence is against the claim. The benefit-of-the-doubt rule does not apply, and the claim must be denied. 38 U.S.C. § 5107 (b); 38 C.F.R. § 3.102.

The Board has considered whether a higher rating by analogy is available through another other diagnostic code that considers similar symptoms but has found none. In this case, the Board finds no other provision upon which to assign a rating higher than 20 percent disabling for duodenal ulcer. Moreover, the Veteran has not reported other symptoms not contemplated by these rating criteria. Accordingly, the claim for a rating higher than 20 percent disabling for duodenal ulcer is denied.

In making its determinations in this case, the Board has carefully considered the Veteran's contentions with respect to the nature and severity of his service-connected duodenal ulcer at issue and notes that his lay testimony is competent to describe certain symptoms associated with this disability that are capable of lay observation. The Veteran's history and symptom reports have been considered, including as presented in the medical evidence discussed above, and are noted to be contemplated by the criteria for the disability rating for which the Veteran has been found entitled by the Board. Moreover, the competent medical evidence offering detailed specific findings pertinent to the rating criteria is the most probative evidence with regard to evaluating the pertinent symptoms of the service-connected disability at issue. As such, while the Board accepts the Veteran's statements with regard to the matters he is competent to address, the Board relies upon the competent medical evidence with regard to the specialized evaluation of functional impairment, symptom severity, and details of clinical

features of the service-connected condition at issue. The Veteran has not been shown to have medical knowledge in this regard.

The Board therefore finds that the criteria for a rating in excess of 20 percent for the Veteran's service-connected duodenal ulcer have not been met at any time during the rating period. Accordingly, there is no basis for staged ratings of the Veteran's duodenal ulcer pursuant to *Fenderson*, 12 Vet. App. at 126-27, and a higher rating must be denied. As the preponderance of the evidence is against the assignment of a higher rating, the benefit-of-the-doubt doctrine is not for application, and the claim must be denied. 38 U.S.C. § 5107 (b); *see also Gilbert v. Derwinski*, 1 Vet. App. 49 (1990).

Neither the Veteran nor his representative has raised any other issues, nor have any other issues been reasonably raised by the record. *See Yancy v. McDonald*, 27 Vet. App. 484, 495 (2016); *Doucette v. Shulkin*, 38 Vet. App. 366, 369-70 (2017) (confirming that the Board is not required to address issues unless they are specifically raised by the claimant or reasonably raised by the evidence of record).

#### *VA's Duty to Notify and Assist*

With respect to the Veteran's claim herein, VA has met all statutory and regulatory notice and duty to assist provisions. *See* 38 U.S.C. §§ 5100, 5102, 5103, 5103A, 5106, 5107, 5126; 38 C.F.R. §§ 3.102, 3.156 (a), 3.159, 3.326; *see also Scott v. McDonald*, 789 F.3d 1375 (Fed. Cir. 2015).

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U. R. POWELL  
Veterans Law Judge  
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD

B. G. LeMoine, Associate Counsel

*The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential, and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.*





## YOUR RIGHTS TO APPEAL OUR DECISION

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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