

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

ROBERT L. VIEIRA,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 19-7511
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

APPELLEE’S MOTION TO DISMISS

Pursuant to U.S. Vet. App. R. 27(a), Appellee Robert L. Wilkie, Secretary of Veterans Affairs, respectfully moves the Court to dismiss the instant appeal, on the grounds that the Notice of Appeal (NOA), filed with the Court by Appellant in the instant case, was prematurely submitted.

Appellant filed an NOA on October 17, 2019, and indicated therein that he disagreed with the Board of Veterans’ Appeals (BVA or Board) decision that was issued on September 19, 2019. However, prior to that, on October 11, 2019, Appellant filed a motion (Exhibit), with the Chairman of the BVA, seeking reconsideration of the BVA decision on appeal. As of this date, Appellant’s motion for reconsideration is awaiting a ruling from the Board.

A copy of the BVA decision on appeal was transmitted to the Court on November 26, 2019, pursuant to U.S. Vet. App. R. 4(c).

Precedent decisions of this Court have held that a BVA decision is not subject to judicial review while a motion for reconsideration filed by the Appellant is pending. *Rosler v. Derwinski*, 1 Vet.App. 241, 249 (1991) (motion for reconsideration filed during 120-day judicial appeal period after BVA decision abates finality of BVA decision); see *Mayer v. Brown*, 37 F.3d 618, 619 (Fed. Cir. 1994) (“[CAVC] has jurisdiction only when the appellant files a timely appeal from a *final* decision of the Board”) (emphasis added); see also *Losh v. Brown*, 6 Vet.App. 87, 90 (1993) (simultaneous filing of motion for reconsideration and NOA renders BVA decision nonfinal, and jurisdiction remains with BVA). As the Court unequivocally stated in *Brienza v. Derwinski*, 2 Vet.App. 584, 585 (1992), “when there is a motion for reconsideration filed within the 120-day judicial appeal period . . . the original BVA decision [is] rendered a nullity [and] the subsequently filed NOA of that decision [is] also a nullity and the appeal must be dismissed.”

The precedents discussed above clearly require the Court to decline jurisdiction over any BVA decision which is nonfinal because the NOA was filed during the pendency of an appellant’s motion for reconsideration by the Board. The Court has deviated from that principle on one occasion, holding, in *Wachter v. Brown*, 7 Vet.App. 396 (1995) (per curiam order), that a premature NOA was merely ineffective, but became effective upon the Chairman’s denial of the motion for BVA reconsideration. The instant case is clearly distinguishable from *Wachter* in that, here, Appellant’s

motion for reconsideration has not been denied. The Court clarified its *Rosler/Wachter* caselaw by holding, in response to the Secretary's motion to dismiss an appeal where a pre-NOA motion for reconsideration was pending before the Chairman of the BVA, that:

Any NOA filed after the motion for reconsideration is filed but before it is decided is premature. It does not become effective unless and until the Chairman denies the motion, if the NOA is still pending before the Court at that time. *Wachter v. Brown*, 7 Vet.App. 396 (1995).

Given that there is no final BVA decision in this matter, there is no appeal before the Court over which it could exercise its jurisdiction.

Pulac v. Brown, 10 Vet.App. 11 (1997) (per curiam order) (emphasis added). The Court further held in *Pulac* that it "lacks jurisdiction to act upon [a] motion" filed on behalf of the appellant in such litigation. *Id.*

Concerns for judicial economy militate against the Court's preempting action by the Chairman of the Board. As the Supreme Court has stated in a related context, "a party who has sought rehearing cannot seek judicial review until the rehearing has concluded." *Stone v. INS*, 115 S.Ct. 1537, 1543 (1995). "Essentially, as long as the motion for reconsideration of the decision remains pending before the Chairman, there is always a possibility that the motion will be granted, an event which would render judicial review unnecessary." *Wachter*, 7 Vet.App. at 397. Certainly, litigation should not proceed until such a motion has been disposed of by the Chairman. See *Blackburn v. Brown*, 8 Vet.App. 97, 101 (1995).

In view of the foregoing, the Court should dismiss the instant appeal based upon Appellant's pending motion for BVA reconsideration.

Appellant is acting *pro se* in this matter.

WHEREFORE, the Secretary respectfully moves the Court to dismiss the instant appeal for lack of subject matter jurisdiction.

Respectfully submitted,

WILLIAM A. HUDSON, JR.
Acting General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Edward V. Cassidy, Jr.
EDWARD V. CASSIDY, JR.
Deputy Chief Counsel
Office of General Counsel (027B)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
(202) 632-6913

Attorneys for Appellee Secretary
of Veterans Affairs

CERTIFICATE OF SERVICE

On the 13th day of December, 2019, a copy of the foregoing was mailed postage prepaid to:

Robert L. Vieira
2789A Booth Road
Honolulu, HI 96813-1185

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

/s/ Edward V. Cassidy, Jr.

EDWARD V. CASSIDY, JR.

Counsel for Appellee



Department of Veterans Affairs

DECISION REVIEW REQUEST: BOARD APPEAL
(NOTICE OF DISAGREEMENT)

PART I - PERSONAL INFORMATION

1. VETERAN'S NAME (First, middle initial, last)

Robert L. Vieira, Captain U.S. Army Vietnam Vet.

2. VETERAN'S SOCIAL SECURITY NUMBER

3. VETERAN'S VA FILE NUMBER (if different than their SSN)

4. VETERAN'S DATE OF BIRTH

C/CSS -

5. IF I AM NOT THE VETERAN, MY NAME IS (First, middle initial, last)

6. MY DATE OF BIRTH (If I am not the Veteran)

7. MY PREFERRED MAILING ADDRESS (Number and street or rural route, P.O. Box, City, State, ZIP Code and Country)

2789 A Booth Road
Honolulu, Hawaii 96813 - 1185I AM HOMELESS
US COURT OF APPEALS
FOR VETERANS CLAIMS

OCT 1 - 2019

8. MY PREFERRED TELEPHONE
NUMBER (Include Area Code)

1-808-9346604

9. MY PREFERRED E-MAIL ADDRESS

Ainakua@aol.com

10. MY REPRESENTATIVE'S NAME

RECEIVED

PART II - BOARD REVIEW OPTION (Check only one)

11. A Veterans Law Judge will consider your appeal in the order in which it is received, depending on which of the following review options you select.
(For additional explanation of your options, please see the attached information and instructions.)

- ☒ 11A. Direct Review by a Veterans Law Judge: I do not want a Board hearing, and will not submit any additional evidence in support of my appeal.
(Choosing this option often results in the Board issuing its decision most quickly.)
- ☐ 11B. Evidence Submission Reviewed by a Veterans Law Judge: I have additional evidence in support of my appeal that I will provide within the next 90 days, but I do not want a Board hearing. (Choosing this option may add delay to issuance of a Board decision.)
- ☐ 11C. Hearing with a Veterans Law Judge: I want a Board hearing and the opportunity to submit additional evidence in support of my appeal that I will provide within 90 days after my hearing. (Choosing this option may add delay to issuance of a Board decision.)

PART III - SPECIFIC ISSUE(S) TO BE APPEALED TO A VETERANS LAW JUDGE AT THE BOARD

12. Please list each issue decided by VA that you would like to appeal. Please refer to your decision notice(s) for a list of adjudicated issues. For each issue, please identify the date of VA's decision and the area of disagreement.

☒ Check here if you attached additional sheets. Include the Veteran's last name and last 4-digits of the Social Security number.Check the SOC/SSOC Opt in box if any issue listed below is being withdrawn from the legacy appeals process. ☐ Opt In from SOC/SSOC

A. Specific Issue(s)	B. Date of Decision
My Age 85 (still working supporting a much younger family) and 7 months old. See attached Request 40% compensation w/ wife and one child	9/19/14

PART IV - CERTIFICATION AND SIGNATURE

I CERTIFY THAT THE STATEMENTS ON THIS FORM ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

13. SIGNATURE (Appellant or appointed representative) (Ink signature)

Robert L. Vieira

14. DATE SIGNED

9/24/19

**INFORMATION AND DETAILED INSTRUCTIONS FOR COMPLETING
DECISION REVIEW REQUEST: BOARD APPEAL
(NOTICE OF DISAGREEMENT)**

NOTE: Use this form **ONLY** if you received your VA decision on or after **February 19, 2019**, and you wish to appeal one or more issues to a Veterans Law Judge at the Board of Veterans' Appeals. **DO NOT USE THIS FORM** to submit a Supplemental Claim (if you wish to have additional evidence reviewed by a VA rater) or request a Higher-Level Review (if you wish to have a new decision by a VA senior reviewer).

If you have any questions about the filing deadline in your case, ask your representative or your local VA office. **Filing on time is very important. Failing to submit on time could result in you losing your right to appeal.**

When should I fill out a Notice of Disagreement? If you have received a decision from a local VA office or a higher-level adjudicator with which you disagree, and you would like one or more issues to be decided by a Veterans Law Judge, you **must** fill out and submit a Notice of Disagreement. You can choose to appeal all or only some of the issues previously decided, however, **ONLY** those issues that you list on your Notice of Disagreement will be considered on appeal.

How long do I have to submit my Notice of Disagreement? Your completed Notice of Disagreement must be post-marked or received by the Board within **one year (365 days)** from the day that your local VA office mailed the notice of the decision. If you do not provide all the information requested in the Notice of Disagreement, VA will consider your form incomplete and will contact you to request clarification and explain your options.

Contested Claim: If you are one of multiple people claiming the right to the same benefit, your completed Notice of Disagreement must be post-marked or received by the Board within **60 days** from the day that your local VA office mailed the notice of the decision. VA will notify you and provide additional information if you are a party to a contested claim.

What are my options for the Board's review? You must choose **one** of three options for how a Veterans Law Judge will review the issue(s) on appeal. Determine which of the below options best fits your situation. Please note that you may choose only one option for each issue you wish to appeal.

REVIEW OPTION	DESCRIPTION
Direct Review	<ul style="list-style-type: none"> - Choose this option if you do not want to submit additional evidence, and you do not want a hearing with a Veterans Law Judge. - The Veterans Law Judge and Board team will review the issue(s) you appealed, and make a new determination based on the evidence that the local VA office considered. - Choosing this option will often result in a Veterans Law Judge at the Board being able to issue its decision most quickly.
Evidence Submission	<ul style="list-style-type: none"> - Choose this option if you want to submit additional evidence, but you do not want to have a hearing with a Veterans Law Judge. - After 90 days, any additional evidence added to your claim will not be considered by the Board. - The Veterans Law Judge and Board team will review the issue(s) you appealed, considering the evidence that the local VA office considered, along with any additional evidence that you submit within 90 days after VA's receipt of your Notice of Disagreement.
Hearing Request	<ul style="list-style-type: none"> - Please note that a Board hearing is optional, and may increase the wait time for a Board decision. - Choose this option if you want a hearing with a Veterans Law Judge, which includes the option to submit additional evidence. - The Board will contact you to schedule your hearing and provide additional information. - After your hearing, the Veterans Law Judge and Board team will review the issue(s) you appealed, considering the evidence that the local VA office considered, along with your hearing testimony and any additional evidence that you submit within 90 days after the hearing.

Find more information on the review options at va.gov/decision-reviews.

Where can I get help with filing my appeal? A Veterans Service Organization or a VA-accredited attorney or agent can represent you or provide guidance. Contact your local VA regional office for assistance or visit: va.gov/ogc/accreditation.asp.

Where do I submit my Notice of Disagreement once I have completed it? When you have completed the Notice of Disagreement, signed and dated it, you must send it to the Board at the address or FAX number below:

Board of Veterans' Appeals
P.O. Box 27063
Washington, DC 20038
FAX: 844-678-8979

What if I want to modify my Notice of Disagreement? You may make a request to modify your Notice of Disagreement for the purpose of selecting a different review option in Part II. Any such request must be made by submitting a new Notice of Disagreement form to the Board within one year (365 days) from the date of mailing of the notice of decision on appeal, or within 60 days of the Board's receipt of the Notice of Disagreement, whichever is later. *You cannot request to modify your Notice of Disagreement if you have already submitted evidence to the Board or testified at a hearing with a Veterans Law Judge.*

Robert L. Vieira
Captain, U.S. Army Infantry
Vietnam Era Veteran
c/o 2789 A Booth Road
Honolulu, Hawaii 96813-1185

CERTIFIED MAIL®



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Clerk, U.S. Court of Appeals
625 Indiana Avenue, NW, Suite 900
Washington, DC 2004-2950

Confidential!

Appeal of Board of
Veterans Decision
September 19, 2019

COURT OF APPEALS FOR VETERANS CLAIMS
625 Indiana Avenue, N.W., Suite 900
Washington, D.C. 20004-2950

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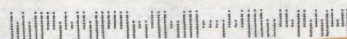
10/07/2019

US POSTAGE \$001.45⁰



ZIP 20004
041M11450416

Board of Veterans Appeals
P.O. Box 27063
Washington, D.C. 20038



OMB Control No. 2900-0862
Respondent Burden: 15 minutes
Expiration Date: 2/28/2022



Department of Veterans Affairs

VA DATE STAMP
DO NOT WRITE IN THIS SPACE

DECISION REVIEW REQUEST: HIGHER-LEVEL REVIEW

INSTRUCTIONS: PLEASE READ THE PRIVACY ACT NOTICE AND RESPONDENT BURDEN INFORMATION ON PAGE 1 BEFORE COMPLETING THIS FORM.

PART I - CLAIMANT'S IDENTIFYING INFORMATION

NOTE: You can either complete the form online or by hand. If completed by hand, print the information requested in ink, neatly, and legibly to expedite processing the form.

1. VETERAN'S NAME (First, Middle Initial, Last)

ROBERT L VIEIRA

2. VETERAN'S SOCIAL SECURITY NUMBER

3. VA FILE NUMBER (If applicable)

4. VETERAN'S DATE OF BIRTH (MM/DD/YYYY)

Month Day Year

5. VETERAN'S SERVICE NUMBER (If applicable)

04076986

6. INSURANCE POLICY NUMBER (If applicable)

7. CLAIMANT'S NAME (First, Middle Initial, Last) (If other than veteran)

8. CLAIMANT TYPE:

☒ VETERAN ☐ VETERAN'S SPOUSE ☐ VETERAN'S CHILD ☐ VETERAN'S PARENT ☐ OTHER (Specify)

9. CURRENT MAILING ADDRESS (Number, street or rural route, City or P.O. Box, State and ZIP Code and Country)

No. & Street 2789A BOOTH ROAD

Apt./Unit Number HSE A City HONOLULU

State/Province HI Country US ZIP Code/Postal Code 96813 - 1185

10. TELEPHONE NUMBER (Include Area Code)

1-808-5546609

11. E-MAIL ADDRESS (Optional)

Ainkuai@aol.com

12. BENEFIT TYPE: PLEASE CHECK ONLY ONE (If you would like to file for multiple benefit types, you must complete a separate request form for each benefit type.)

☒ COMPENSATION ☐ PENSION/SURVIVORS BENEFITS ☐ FIDUCIARY ☐ EDUCATION ☐ VETERANS HEALTH ADMINISTRATION
☐ VOCATIONAL REHABILITATION AND EMPLOYMENT ☐ LOAN GUARANTY ☐ INSURANCE ☐ NATIONAL CEMETERY ADMINISTRATION

PART II - HIGHER-LEVEL REVIEW OPTIONS

13. IF YOU WOULD LIKE THE SAME OFFICE THAT ISSUED YOUR PRIOR DECISION TO CONDUCT THE REVIEW, YOU CAN MAKE THAT REQUEST BY CHECKING THE BOX BELOW. IF YOU DO NOT CHECK THE BOX, VA WILL TAKE THAT AS A REQUEST TO HAVE A DIFFERENT OFFICE CONDUCT THE REVIEW. (Please note VA may be unable to grant your request.)

☒ If available, I would like ~~to appeal the~~ **HIGHER-LEVEL REVIEW** conducted at the same office within the agency of original jurisdiction.

14. IN ADDITION, YOU OR YOUR AUTHORIZED REPRESENTATIVE MAY REQUEST AN INFORMAL CONFERENCE WITH THE HIGHER-LEVEL REVIEWER. (This is a telephonic communication with the higher level reviewer for the sole purpose of pointing out errors of fact or law in the prior decision. VA will only conduct one informal conference associated with this request for higher-level review. Check the box below to request an informal conference.)

☒ I, or my representative, would like an informal conference. (VA will make up to two attempts to call you between 8:00a.m. and 4:30p.m. Eastern Standard Time at the telephone number and time period you select below to schedule your informal conference. Please select up to two time periods you are available to receive a phone call.)

☒ 8:00a.m. - 10:00a.m.

☒ 10:00a.m. - 12:30p.m.

☒ 12:30p.m. - 2:00p.m.

☒ 2:00p.m. - 4:30p.m.

all OK

If you would like for VA to contact your representative, please provide your representative's name and telephone number where he or she can be reached at the above checked time.

PART III - ISSUES FOR HIGHER-LEVEL REVIEW

15. YOU MUST INDICATE BELOW EACH ISSUE DECIDED BY VA FOR WHICH YOU ARE REQUESTING A HIGHER-LEVEL REVIEW. Please refer to your decision notice(s) for a list of adjudicated issues. For each issue, please identify the date of VA's decision. You may attach additional sheets, if necessary. Please include your name and file number on each additional sheet.

Check this box if any issue listed below is being withdrawn from the legacy appeals process. ☐ OPT-IN from SOC/SSOC

15A. SPECIFIC ISSUE(S)

15B. DATE OF VA DECISION NOTICE

Gentlemen,
 Since you have made a decision to not to increase my entitlement (40%) 40% disability for compensation, I am appealing to re-consider for a specific reason mentioned in the attached letter dated 9/7/19.
 That reason is my Age. (well over 75)
 I am still working at Age 85, and supporting a young family with daughters 26 and 21. My wife is a retired R.N. My hearing loss (20%) impedes my cognizant understanding daily.

Capt. Robert Vienna
 Appellant

PART IV - CERTIFICATION AND SIGNATURE

NOTE: This section is MANDATORY and completion is required to process your claim; any omission may delay claim processing time.

VA AUTHORIZED REPRESENTATIVES ONLY: I certify that the claimant has authorized the undersigned representative to file this higher-level review on behalf of the claimant and that the claimant is aware and accepts the information provided in this document. I certify that the claimant has authorized the undersigned representative to state that the claimant certifies the truth and completion of the information contained in this document to the best of claimant's knowledge.

NOTE: A power of attorney's (POA's) signature will not be accepted unless at the time of submission of this request a valid VA Form 21-22, Appointment of Veterans Service Organization as Claimant's Representative, or VA Form 21-22a, Appointment of Individual As Claimant's Representative, indicating the appropriate POA is of record with VA.

I CERTIFY THAT the statements on this form are true and correct to the best of my knowledge and belief.

16A. SIGNATURE OF VETERAN OR CLAIMANT OR VA AUTHORIZED REPRESENTATIVE (Sign in ink)

16B. DATE SIGNED

16C. NAME OF VA AUTHORIZED REPRESENTATIVE (Please Print)

ALTERNATE SIGNER CERTIFICATION AND SIGNATURE

17. I CERTIFY THAT by signing on behalf of the claimant, that I am a court-appointed representative; OR, an attorney in fact or agent authorized to act on behalf of a claimant under a durable power of attorney; OR, a person who is responsible for the care of the claimant, to include but not limited to a spouse or other relative; OR, a manager or principal officer acting on behalf of an institution which is responsible for the care of an individual; AND, that the claimant is under the age of 18; OR, is mentally incompetent to provide substantially accurate information needed to complete the form, or to certify that the statements made on the form are true and complete; OR, is physically unable to sign this form.

I understand that I may be asked to confirm the truthfulness of the answers to the best of my knowledge under penalty of perjury. I also understand that VA may request further documentation or evidence to verify or confirm my authorization to sign or complete an application on behalf of the claimant if necessary. Examples of evidence which VA may request include: Social Security Number (SSN) or Taxpayer Identification Number (TIN); a certificate or order from a court with competent jurisdiction showing your authority to act for the claimant with a judge's signature and a date/time stamp; copy of documentation showing appointment of fiduciary; durable power of attorney showing the name and signature of the claimant and your authority as attorney in fact or agent; health care power of attorney, affidavit or notarized statement from an institution or person responsible for the care of the claimant indicating the capacity or responsibility of care provided; or any other documentation showing such authorization.

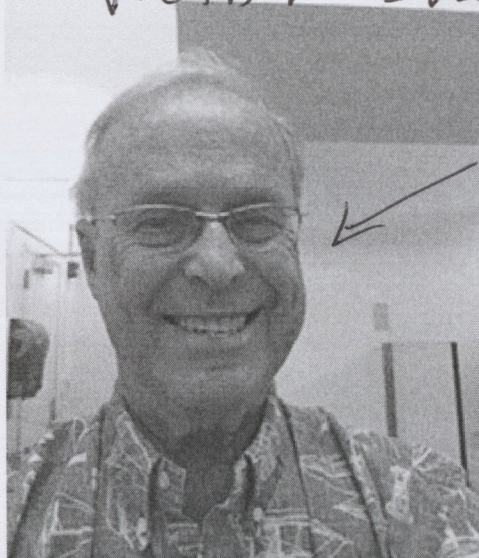
17A. SIGNATURE OF ALTERNATE SIGNER (Sign in ink)

17B. DATE SIGNED

17C. NAME OF ALTERNATE SIGNER (Please Print)

PENALTY: The law provides severe penalties which include a fine, imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false.

Captain U.S. Army
Infantry
Vietnam Era Veteran



Left Ear
Ski Slope
Hearing Loss
affects my complete
understanding
in group or
large meetings

85 years and
7 months old and
still working
hard for a living
and supporting
a retired wife and
one college age (21)
student.



Vietnam Era Vet
14 yrs of service



1st Lt. U.S. Army (Reserve)
Hawaii Air National Guard
T-33 trainer
Flight, Hickam AFB
Honolulu, H.I.

Department Of Veterans Affairs
Evidence Intake Center
P.O. Box 4444
Janesville, WI, 53547-4444



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ROBERT LOUIS VIEIRA
2789 Booth Rd Apt A
Honolulu HI 96813

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DEPARTMENT OF VETERANS AFFAIRS
Board of Veterans' Appeals
Washington DC 20038

Date: 09/07/19

In Reply Refer To: (014/CREB/611)

ROBERT L VIEIRA
 2789-A BOOTH RD
 HONOLULU, HI 96813

Dear Appellant:

The Board of Veterans' Appeals (Board) has formally placed your appeal on the Board's docket. Depending on several factors, including the docket number assigned to your appeal (generally based upon the date you filed your Form 9), as well as the complexity of legal or medical questions raised by the record, it may take more or less time for the Board to issue a decision in your case.

The Board is required by law (38 U.S.C. § 7107(a)) to review appeals in docket order unless unusual hardship or "other sufficient cause" has been shown to advance a case on the docket. If applicable, you may submit brief, but complete, reasons to the Board for advancing your case on the docket, which **must** include supporting documentation to factually demonstrate reasons for advancement. The following are some examples of unusual hardship or other sufficient causes, along with recommended supporting documentation:

Based on **Severe financial problems** (bankruptcy petition or home foreclosure notice);

Serious illness (physician's statement documenting serious illness, preferably with clinical findings); or

Advanced age of 75 years or more.

85 yrs 7 mos Motions for advancement on the docket, along with supporting documentation, should be submitted to: Director, Office of Management, Planning and Analysis (014), Board of Veterans' Appeals, P.O. Box 27063, Washington, DC 20038. Please include your name, the Veteran's name (if different), and your claim number.

Please note that you have **90 days from the date of this letter or until the Board issues a decision in your appeal (whichever comes first)** to request a change in representation or to submit additional argument or evidence, if you elect to do so. Any such request or submission must be sent directly to the Board. *See generally* 38 C.F.R. § 20.1304.

You can check the status of your appeal via eBenefits, www.eBenefits.va.gov. If you do not already have an eBenefits account, please visit the eBenefits website for more information on how to register. You may also contact the Board at (800) 923-8387, from 8:00 a.m. to 4:30 p.m., Eastern Time, Monday through Friday, or via fax at 1-(844) 678-8979. Any questions about factual or legal matters involved in your appeal should be directed to your representative, if you have one.

Sincerely yours,



K. Osborne
 Deputy Vice Chairman

**BOARD OF VETERANS' APPEALS**

FOR THE SECRETARY OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: September 19, 2019

SS [REDACTED]

ROBERT L. VIEIRA
2789 Booth Rd Apt A
Honolulu, HI 96813
USA

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)



BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
ROBERT L. VIEIRA

[REDACTED]
Docket No. 19-24 572
Advanced on the Docket

DATE: September 19, 2019

ORDER

Entitlement to an initial rating in excess of 10 percent for bilateral tinnitus is denied.

Entitlement to an initial rating in excess of 10 percent for bilateral hearing loss is denied.

FINDINGS OF FACT

1. The Veteran's service-connected tinnitus is assigned a 10 percent rating, which is the maximum schedular rating authorized for tinnitus under Diagnostic Code 6260, for either a unilateral or a bilateral condition.
2. The Veteran's service-connected bilateral hearing loss has been productive of no more than Level IV hearing impairment in his right ear and Level IV in his left ear.

CONCLUSIONS OF LAW

1. The criteria for an initial rating in excess of 10 percent for tinnitus have not been met. 38 U.S.C. § 1155; 38 C.F.R. § 4.87, Diagnostic Code (DC) 6260.

IN THE APPEAL OF
ROBERT L. VIEIRA

SS [REDACTED]
Docket No. 19-24 572
Advanced on the Docket

2. The criteria for an initial rating in excess of 10 percent for bilateral hearing loss have not been met. 38 U.S.C. §§ 1155, 5107; 38 C.F.R. §§ 3.159, 4.3, 4.7, 4.85, 4.86, Diagnostic Code 6100.

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty from February 1957 to February 1959.

Increased Rating

A disability rating is determined by the application of VA's Schedule for Rating Disabilities (Rating Schedule), 38 C.F.R. Part 4. The percentage ratings contained in the Rating Schedule represent, as far as can be practicably determined, the average impairment in earning capacity resulting from diseases and injuries incurred or aggravated during military service and their residual conditions in civil occupations. Separate diagnostic codes identify the various disabilities. 38 U.S.C. § 1155; 38 C.F.R. § 4.1.

Where there is a question as to which of two evaluations shall be applied, the higher rating will be assigned if the disability picture more nearly approximates the criteria 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. *Fenderson v. West*, 12 Vet. App. 119, 126-27 (1999).

1. Entitlement to an initial rating in excess of 10 percent for bilateral tinnitus

The Veteran has requested an increased rating for his service-connected tinnitus.

The Veteran's service-connected tinnitus has been assigned a 10 percent rating, which is the maximum schedular rating available for tinnitus. 38 C.F.R. § 4.87, Diagnostic Code 6260.

IN THE APPEAL OF
ROBERT L. VIEIRA

 B
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Under that Diagnostic Code 6260, a single 10 percent rating is assigned for tinnitus, whether the sound is perceived as being in one ear, both ears, or in the head. The maximum schedular rating available for tinnitus is 10 percent. 38 U.S.C. § 1155; 38 C.F.R. § 4.87; *Smith v. Nicholson*, 451 F.3d. 1344 (Fed. Cir. 2006). During the July 2019 VA examination, the Veteran reported his tinnitus distracting him and affecting his sleep. The Veteran has not reported missing work because of the effects of his tinnitus, and he reported no impact from tinnitus on his daily life during the November 2016 examination. The Board finds these reported symptoms are not exceptional and contemplated as part of the usual disability picture presented by tinnitus of ringing or other sounds perceived in the ears. As such, the Board finds the evidence does not satisfy the three-part test for referral for extra-schedular consideration pursuant to 38 C.F.R. § 3.321(b)(1). *Thun v. Peake*, 22 Vet. App. 111, 115 (2008).

As there is no legal basis upon which to award a higher schedular rating, or separate schedular ratings for each ear, the appeal must be denied. *Sabonis v. Brown*, 6 Vet. App. 426 (1994).

2. Entitlement to an initial rating in excess of 10 percent for bilateral hearing loss

The Veteran's bilateral hearing loss is currently rated 10 percent under Diagnostic Code 6100.

The assignment of a disability rating for hearing impairment is "derived by a mechanical application of the rating schedule to the numeric designations assigned after audiometry evaluations are rendered." *Lendenmann v. Principi*, 3 Vet. App. 345, 349 (1993). VA regulations provide a table (Table VI) to determine a Roman numeral designation (I through XI) for hearing impairment, established by a state-licensed audiologist including a controlled speech discrimination test (Maryland CNC), and based upon a combination of the percent of speech discrimination and the puretone threshold average, which is the sum of the puretone thresholds at 1000, 2000, 3000 and 4000 Hertz, divided by four. 38 C.F.R. § 4.85. Table VII is used to determine the percentage rating by combining the Roman numeral designations for hearing impairment of each ear. A hearing

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examination for VA purposes must be conducted by a state-licensed audiologist and must include a controlled speech discrimination test using the Maryland CNC test and a puretone audiometry test. VA audiometric examinations for rating purposes are to be conducted without the use of hearing aids. 38 C.F.R. § 4.85(a).

Table VIa will be used when the examiner certifies that use of the speech discrimination test is not appropriate because of language difficulties, inconsistent speech discrimination scores, or other reasons, or when indicated under the provisions of 38 C.F.R. § 4.86. 38 C.F.R. § 4.85(c). When the puretone threshold at each of the four specified frequencies (1000, 2000, 3000, and 4000 Hertz) is 55 decibels or more or when the puretone threshold is 30 decibels or less at 1000 Hertz, and 70 decibels or more at 2000 Hertz, the rating specialist will determine the Roman numeral designation for hearing impairment from either Table VI or Table VIa, whichever results in the higher numeral. That numeral will then be elevated to the next higher Roman numeral. Each ear will be evaluated separately. 38 C.F.R. § 4.86.

In *Martinak v. Nicholson*, the Court held that in addition to dictating objective test results, a VA audiologist must fully describe the functional effects caused by a hearing disability in his or her final report. 21 Vet. App. 447, 455 (2007). The Court also noted, however, that even if an audiologist's description of the functional effects of a veteran's hearing disability was somehow defective, the veteran bears the burden of demonstrating any prejudice caused by a deficiency in the examination. *Id.*

A July 2019 VA examination yielded the following audiological results: puretone thresholds for the left ear, in decibels, at 1000, 2000, 3000, and 4000 hertz (Hz) as follows: 15, 50, 85, and 100, for an average of 62.5 decibels, and puretone thresholds for the right ear, in decibels, at 1000, 2000, 3000, and 4000 Hz as follows 30, 40, 95, and 105, for an average of 67.5 decibels. The speech recognition score, using the Maryland CNC Test, was 80 percent for the left ear and 82 percent for the right ear. The examiner noted that the Veteran has bilateral sensorineural hearing loss. The Veteran reported that his hearing loss makes hearing voices and speech in a crowded room difficult. The Veteran's hearing loss was originally evaluated in November 2016 examination. The results of that

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examination showed hearing loss less disabling than the 2019 VA examination; therefore, they are not discussed in any detail.

The Veteran submitted the results from private audiometric testing from March 2018. The private audiologist recorded puretone thresholds for the right ear, in decibels, at 1000, 2000, 3000, and 4000 hertz (Hz) as 25, 30, 95, and 105, for an average of 63.75 decibels, and puretone thresholds for the left ear, in decibels, at 1000, 2000, 3000, and 4000 Hz as 10, 55, 85, and 100, for an average of 62.5 decibels. The speech recognition score was 84 in the left ear and 88 in the right ear. It is not clear from the results of the audiometric testing if the Maryland CNC test was conducted in accordance with 38 C.F.R. § 4.85 (a). However, even assuming the test was conducted using the Maryland CNC, the results do not warrant a rating in excess of 10 percent for hearing loss. The left and right ear puretone threshold averages and speech recognition scores combine for level III designations in Table VI and a zero, noncompensable rating in Table VII.

Evaluating the VA audiological test results cited above, when the puretone threshold averages and the speech recognition scores are applied to Table VI, the numeric designation of hearing impairment is level IV for the left ear and level IV for the right ear. When these numeric designations from the VA examination are applied to Table VII, the percentage of disability for hearing impairment is 10 percent.

The Veteran contends that his hearing loss is more severe than currently evaluated. While competent to report symptoms attributable to his hearing loss, he is not competent to report the specific measurements required to evaluate a hearing loss disability, because such measurements be collected by a state-licensed audiologist using specific tests and the Veteran has not been shown to possess the needed qualifications. *See Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007).

Indeed, even after considering the effects of the disability on his daily life such as difficulty hearing even when in a quiet room, the Board finds that the criteria for a rating in excess of 10 percent are not met. *See Lendenmann, supra* (assignment of disability ratings for hearing impairment are derived by a mechanical application

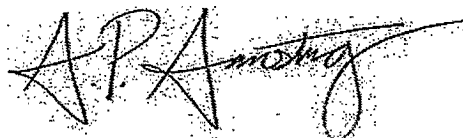
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of the rating schedule to the numeric designations assigned after audiometric evaluation are rendered); *Doucette v. Shulkin*, 28 Vet. App. 366 (2017).

In reviewing the record, the Board finds that the Veteran's degree of bilateral hearing loss does not meet the standards for a rating in excess of 10 percent at any point during the appeal period. There is also no evidence of an exceptional pattern of hearing during the appeal period to warrant an increased rating under 38 C.F.R. § 4.86. Thus, there is no basis for assignment of a rating in excess of 10 percent at any time during the appeal period.

As the preponderance is against the Veteran's claim for an initial rating in excess of 10 percent for bilateral hearing loss, the claim is denied. In reaching this conclusion, the Board has considered the applicability of the benefit-of-the-doubt doctrine. However, as the preponderance of the evidence is against the claim, that doctrine is not applicable. *See* 38 U.S.C. § 5107 (b); 38 C.F.R. § 3.102, *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990).



A.P. Armstrong
Acting Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board

Christopher W. King, Law Clerk

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.

CERTIFICATE OF LIVE BIRTH

STATE OF HAWAII
DEPARTMENT OF HEALTH



CERTIFICATE NO. [REDACTED]

CHILD'S NAME

ROBERT LOUIS VIEIRA

DATE OF BIRTH

[REDACTED]
MARCH 27, 1934

HOUR OF BIRTH

8:18 AM

SEX

MALE

CITY, TOWN OR LOCATION OF BIRTH

HONOLULU

ISLAND OF BIRTH

OAHU

COUNTY OF BIRTH

HONOLULU

MOTHER'S MAIDEN NAME

AGNES MARIE GOUVEIA

MOTHER'S RACE

PORTUGUESE

FATHER'S NAME

ALFRED HERBERT VIEIRA

FATHER'S RACE

PORTUGUESE

DATE FILED BY REGISTRAR

March 28, 1934