BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

WASHINGTON, DC 20038

Date: July 22, 2019 [redacted]

LEWIS H. DUSETT
4290 Canal Rd
Adams Basin , NY 14410

Dear Appellant:

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

If your decision contains a	*What happens next*
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: The American Legion

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BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
LEWIS H. DUSETT
REPRESENTED BY
The American Legion

[redacted]
Docket No. 16-35 336A

DATE: July 22, 2019

ORDER

Entitlement to service connection for right shoulder condition is denied.

Entitlement to service connection for lower back condition is denied.

Entitlement to service connection for neck condition is denied.

Entitlement to service connection for bilateral knee condition is denied.

Entitlement to service connection for tinnitus is granted.

FINDINGS OF FACT

1. The preponderance of the evidence of record is against finding a current diagnosis of right shoulder condition at any time during or approximate to the pendency of the claim.

2. The preponderance of the evidence of record is against finding a current diagnosis of lower back condition at any time during or approximate to the pendency of the claim.

3. The preponderance of the evidence of record is against finding a current diagnosis of neck condition at any time during or approximate to the pendency of the claim.

4. The preponderance of the evidence of record is against finding a current diagnosis of bilateral knee condition at any time during or approximate to the pendency of the claim.

5. The Veteran's tinnitus is etiologically related to active service.

CONCLUSIONS OF LAW

1. The criteria for service connection for right shoulder condition have not been satisfied. 38 U.S.C. §§ 1110, 1131, 1153, 5107 (2012); 38 C.F.R. §§ 3.102, 3.303, 3.306 (2017).

2. The criteria for service connection for lower back condition have not been satisfied. 38 U.S.C. §§ 1110, 1131, 1153, 5107 (2012); 38 C.F.R. §§ 3.102, 3.303, 3.306 (2017).

3. The criteria for service connection for neck condition have not been satisfied. 38 U.S.C. §§ 1110, 1131, 1153, 5107 (2012); 38 C.F.R. §§ 3.102, 3.303, 3.306 (2017).

4. The criteria for service connection for bilateral knee condition have not been satisfied. 38 U.S.C. §§ 1110, 1131, 1153, 5107 (2012); 38 C.F.R. §§ 3.102, 3.303, 3.306 (2017).

5. The criteria for service connection for tinnitus are met. 38 U.S.C. §§ 1110, 1111, 1131, 5107(b); 38 C.F.R. §§ 3.102, 3.303(a).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

The Veteran served on active duty in the United States Marine Corps from August 2008 to January 2009 and May 2010 to May 2011.

Service Connection

Service connection may be granted for a disability resulting from a disease or injury incurred in or aggravated by active service. *See* 38 U.S.C. § 1110, 1131; 38 C.F.R. § 3.303. "To establish a right to compensation for a present disability, a veteran must show: '(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service' – the so-called "nexus" requirement." *Holton v. Shineski*, 557 F.3d 1362, 1366 (Fed. Cir. 2010) (quoting *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004)).

1. Right Shoulder Condition

The Board concludes that the Veteran does not have a current diagnosis of right shoulder condition and has not had one at any time during the pendency of the claim or recent to the filing of the claim. 38 U.S.C. §§ 1110, 1131, 5107(b); *Holton v. Shinseki*, 557 F.3d 1363, 1366 (Fed. Cir. 2009); *Romanowsky v. Shinseki*, 26 Vet. App. 289, 294 (2013); *McClain v. Nicholson*, 21 Vet. App. 319, 321 (2007); 38 C.F.R. § 3.303(a), (d).

The Veteran underwent a VA examination in July 2014. The examiner did not find a diagnosis related to the right shoulder and reported that the Veteran had a normal shoulder examination. The Veteran denied shoulder pain and reported no limitations with activities of daily living. Range of motion testing revealed full range of motion with no pain and no abnormalities were found upon examination. The examiner noted that the Veteran is able to perform repetitive use testing with three repetitions without limitations or objective pain. Additionally, the examiner reported that pain, weakness, fatigability, or incoordination does not significantly limit functional ability during a flare-up or if the joint is used repeatedly over a period of time. The examiner concluded that the Veteran's shoulder does not impact his ability to work and opined that the Veteran's claimed condition is less likely than not incurred in or caused by active service as he had a normal examination.

Review of the medical treatment records confirms that the evidence of record does not contain a diagnosis pertaining to the right shoulder. A May 2016 treatment note found slight external weakness when compared to the left shoulder. The Veteran underwent imaging of his right shoulder in June 2016, which revealed no abnormalities.

While the record indicates that the Veteran has complained of right shoulder pain, the evidence does not establish that the Veteran has symptoms related to his right shoulder that result in any functional impairment. *See Saunders v. Wilkie*, No. 2017-1466, 2018 U.S. App. LEXIS 8467 (Fed. Cir. Apr. 3, 2018) (holding that a "disability" under 38 U.S.C. § 1110 refers to functional impairment of earning capacity). The VA examiner found no abnormalities or limitations of the right shoulder and notably the Veteran denied any limitations in activities of daily living. The Board finds that there is no objective evidence of record establishing functional impairment per the requirements of *Saunders*. Service connection for complaints of pain is not warranted in this situation.

To the extent that the Veteran alleges that he has a diagnosed right shoulder condition, this allegation is without probative value. The determination as to whether the Veteran has a diagnosis of right shoulder condition is a complex medical question which requires specialized knowledge as well as pertinent testing to diagnose. As a lay person, the Veteran does not have the requisite knowledge to provide the diagnosis.

Therefore, the Board finds the evidence insufficient to establish a current disability. Congress has specifically limited entitlement to service connection to cases where such incidents have resulted in a disability. *Brammer v. Derwinski*, 3 Vet. App. 223, 255 (1992). In the absence of proof of a present disability there can be no valid claim. *Id*. As such, the preponderance of the evidence is against the claim for service connection for right shoulder condition.

2. Lower Back Condition and Neck Condition

The Board concludes that the Veteran does not have a current diagnosis of a lower back or neck condition and has not had one at any time during the pendency of the claim or recent to the filing of the claim. 38 U.S.C. §§ 1110, 1131, 5107(b);

Holton v. Shinseki, 557 F.3d 1363, 1366 (Fed. Cir. 2009); *Romanowsky v. Shinseki*, 26 Vet. App. 289, 294 (2013); *McClain v. Nicholson*, 21 Vet. App. 319, 321 (2007); 38 C.F.R. § 3.303(a), (d).

Review of the medical treatment records confirms that the evidence of record does not contain a diagnosis of or treatment for a lower back or neck condition. While the medical record contains a complaint of a stiff neck and back, there is no objective evidence of limitation of motion, painful motion or resulting functional impairment. *See Saunders*, No. 2017-1466, 2018 U.S. App. LEXIS 8467. The Board finds that there is no objective evidence of record establishing functional impairment per the requirements of *Saunders*. Service connection for complaints of pain is not warranted in this situation.

To the extent that the Veteran alleges he has diagnosed lower back or neck conditions, this allegation is without probative value. These are complex medical questions which requires specialized knowledge as well as pertinent testing to diagnose. As a lay person, the Veteran does not have the requisite knowledge to provide the diagnoses.

Therefore, the Board finds the evidence insufficient to establish a current disability. Congress has specifically limited entitlement to service connection to cases where such incidents have resulted in a disability. *Brammer v. Derwinski*, 3 Vet. App. 223, 255 (1992). In the absence of proof of a present disability there can be no valid claim. *Id*. As such, the preponderance of the evidence is against the claim for service connection for lower back condition and neck condition.

Additionally, the Board notes that the duty to assist by providing a VA examination is not triggered as the record does not establish current diagnoses for the neck and back. *See McLendon v. Nicholson*, 20 Vet. App. 79 (2006).

3. Bilateral Knee Condition

The Board concludes that the Veteran does not have a current diagnosis of bilateral knee condition and has not had one at any time during the pendency of the claim or recent to the filing of the claim. 38 U.S.C. §§ 1110, 1131, 5107(b); *Holton v. Shinseki*, 557 F.3d 1363, 1366 (Fed. Cir. 2009); *Romanowsky v. Shinseki*, 26 Vet.

App. 289, 294 (2013); *McClain v. Nicholson*, 21 Vet. App. 319, 321 (2007); 38 C.F.R. § 3.303(a), (d).

The Veteran attended a VA examination in July 2014. The examiner noted that the Veteran had a right tibial shaft fracture in 2005 and a patellar tendon strain in 2010, both of which are resolved. The examiner reported that the examination was normal with no current diagnosis pertaining to the knees. The Veteran denied pain at the examination and denied any limitations with activities of daily living. The examination revealed range of motion within normal limits with no objective evidence of pain. His muscle strength was normal and the examiner opined that pain, weakness, fatigability, or incoordination does not significantly limit functional ability during a flare-up or if the joint is used repeatedly over a period of time. For the right knee, the examiner noted that the service treatment records document patellar tendon strain; however, it was acute and self-resolved. For the left knee the examiner noted the service treatment records do not contain any treatment. The examiner opined that the Veteran's claimed condition is less likely than not incurred in or caused by active service as he had a normal bilateral knee examination.

Review of the medical treatment records confirms that the evidence of record does not contain a diagnosis pertaining to the knees. The Veteran complained of knee pain that is worse after sitting and squatting however, imaging studies yielded negative results. Additionally, the Veteran's reports of pain after sitting and squatting is inconsistent with the objective findings of the VA examination and the Veteran's own report of no limitations of activities of daily living. As such, the Board gives greater weight to the findings of the VA examiner, who found that the Veteran's knee does not impact his ability to work as this determination was based off objective medical evidence revealing no reduction in strength and no limitations in motion. *See Saunders*, No. 2017-1466, 2018 U.S. App. LEXIS 8467.

The Veteran's allegation that he has a bilateral knee condition is without probative value as it requires specialized knowledge as well as pertinent testing to diagnose. As a lay person, the Veteran does not have the requisite knowledge to provide the diagnosis.

There is no objective evidence of limitation of motion, painful motion or resulting functional impairment in the knees. *See Saunders*, No. 2017-1466, 2018 U.S. App. LEXIS 8467. The Board finds that there is no objective evidence of record establishing functional impairment per the requirements of *Saunders*. Service connection for complaints of pain is not warranted in this situation.

Therefore, the Board finds the evidence insufficient to establish a current disability. Congress has specifically limited entitlement to service connection to cases where such incidents have resulted in a disability. *Brammer v. Derwinski*, 3 Vet. App. 223, 255 (1992). In the absence of proof of a present disability there can be no valid claim. *Id*. As such, the preponderance of the evidence is against the claim for service connection for bilateral knee condition.

4. Tinnitus

The Board finds entitlement to service connection for tinnitus is warranted.

For a veteran who served 90 days or more of active service after December 31, 1946, there is a presumption of service connection for certain chronic diseases, to include tinnitus, if the disability is manifest to a compensable degree within one year of discharge from service. *See* 38 U.S.C. § 1101, 1112, 1113 (2012); 38 C.F.R. § 3.307, 3.309 (2017); *Fountain v. McDonald*, 27 Vet. App. 258 (2015). Where the condition noted during service is not shown to be chronic or where the diagnosis of chronicity may be legitimately questioned, service connection may be established by a continuity of symptomatology after discharge. 38 C.F.R. § 3.303 (b) (2017). The presumption relating to a continuity of symptomatology can be used only in cases involving conditions recognized as chronic under 38 C.F.R. § 3.309 (a). *See Walker v. Shinseki*, 708 F.3d 1331 (Fed. Cir. 2013).

For the showing of chronic disease in service there is required a combination of manifestations sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time. 38 C.F.R. § 3.303(b). If chronicity in service is not established, a showing of continuity of symptoms after discharge is required to support the claim. *Id*.

Due to the inherently subjective nature of tinnitus, the Veteran is competent to provide a lay diagnosis. *See Charles v. Principi*, 16 Vet. App. 370 (2002). Thus, a current diagnosis of tinnitus is established.

The Veteran alleges exposure to acoustic trauma during active service. The Veteran's DD-214 confirms his military occupational specialty of rifleman and service in Afghanistan. According to the Veteran, he began to hear ringing in his ears after his deployment and it has continued ever since. The Board finds the Veteran's statements competent. *See Barr v. Nicholson*, 21 Vet. App. 303 (2007) (holding that the Board can weigh the lay testimony and make a determination as to whether the lay testimony supports a finding of in-service incurrence or continuity of symptomatology). Thus, exposure to acoustic trauma during active service is conceded.

The Veteran underwent a VA examination in September 2014 and reported that his tinnitus began after he returned from Afghanistan. The examiner concluded that an opinion could not be provided without speculation. The Veteran attended another VA examination in April 2017 and reported ringing in his ears that began after his deployment. The examiner again stated that an opinion could not be provided without speculation as the Veteran provided unreliable responses during pure tone testing.

Lay evidence is competent and sufficient to establish etiology if the layperson is competent to identify the medical condition. *Davidson v. Shinseki*, 581 F.3d 1313, 1316 (Fed. Cir. 2009); *Jandreau v. Nicholson*, 492 F.3d 1372, 1376-77 (Fed. Cir. 2007). The Veteran's statements establish continuous ringing in his ears since active service; therefore, the Board finds that tinnitus is etiologically related to the Veteran's military service. *See Buchanan v. Nicholson*, 451 F.3d 1331 (Fed. Cir. 2006). Service connection for tinnitus is granted.

IN THE APPEAL OF
LEWIS H. DUSETT [redacted] Docket No. 16-35 336A

G. A. WASIK
Veterans Law Judge
Board of Veterans' Appeals

ATTORNEY FOR THE BOARD S. A. Prinsen, 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

CONTINUED ON NEXT PAGE

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).