

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

LEWIS H. DUSETT III,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 19-8125
)	
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 because the Notice of Appeal (NOA), filed with the Court by Appellant in the instant case, was prematurely submitted.

Appellant filed an NOA on November 21, 2019, and indicated that Appellant disagreed with the Board of Veterans’ Appeals (Board) decision that was issued on July 22, 2019. However, prior to that, on November 20, 2019, the Chairman of the Board received a motion seeking reconsideration of the Board decision on appeal. Exhibit 1. As of this date, Appellant’s motion for reconsideration is awaiting a ruling by the Board.

A copy of the Board decision on appeal was transmitted to the Court on December 23, 2019, pursuant to U.S. Vet. App. R. 4(c).

This Court has held that a Board 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) (holding that a motion for reconsideration filed during 120-day judicial appeal period after Board decision abates finality of Board decision); see *Mayer v. Brown*, 37 F.3d 618, 619 (Fed. Cir. 1994) (finding the Court “has jurisdiction only when the appellant files a timely appeal from a *final* decision of the [B]oard”) (emphasis added); see also *Losh v. Brown*, 6 Vet.App. 87, 90 (1993) (holding that simultaneous filing of a motion for reconsideration and a NOA renders Board decision nonfinal, and jurisdiction remains with Board). As the Court unequivocally stated in *Brienza v. Derwinski*, 2 Vet.App. 584, 585 (1992), “when there is a motion for [Board] reconsideration filed during the 120-day judicial appeal period, . . . the original [Board] decision [is] rendered a nullity [and] the subsequently filed NOA of that decision [is] also a nullity and the appeal must be dismissed.” Thus, this Court should decline jurisdiction over any Board decision that 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 that it became effective upon the Chairman’s denial of the motion for Board 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 Board, the following:

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 [Board] decision in this matter, there is no appeal before the Court over which it could exercise its jurisdiction.

Pulac v. Brown, 10 Vet.App. 12 (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*, 514 U.S. 386, 392 (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 Board reconsideration.

Appellant is *pro se*.

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/ Anna Whited
ANNA WHITED
Deputy Chief Counsel

/s/ Nicholas R. Esterman
NICHOLAS R. ESTERMAN
Senior Appellate Attorney
Office of the General Counsel (027F)
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420
(202) 632-8392

Counsel for the Secretary

CERTIFICATE OF SERVICE

On January 28, 2020, a copy of the foregoing was mailed postage prepaid to:

Lewis H. Duset, III
4290 Canal Rd.
Adams Basin, NY 14410

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

/s/ Nicholas R. Esterman
NICHOLAS R. ESTERMAN
Counsel for Appellee

EXHIBIT 1



Department of Veterans Affairs

STATEMENT IN SUPPORT OF CLAIM

INSTRUCTIONS: Read the Privacy Act and Respondent Burden on Page 2 before completing the form. Complete as much of Section I as possible. The information requested will help process your claim for benefits. If you need any additional room, use the second page.

VA DATE STAMP
(DO NOT WRITE IN THIS SPACE)**SECTION I: VETERAN/BENEFICIARY'S IDENTIFICATION INFORMATION**

NOTE: You will either complete the form online or by hand. Please print the information request in ink, neatly, and legibly to help process the form.

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

Lewis Harold Dusetz III

2. VETERAN'S SOCIAL SECURITY NUMBER

[REDACTED]

3. VA FILE NUMBER (If applicable)

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

[REDACTED]/1989

5. VETERAN'S SERVICE NUMBER (If applicable)

6. TELEPHONE NUMBER (Include Area Code)

(585) 406-5562

7. E-MAIL ADDRESS (Optional)

luke.dusetz@gmail.com

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

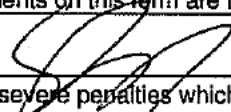
4290 Canal Rd Adams Basin NY, 14410

SECTION II: REMARKS

(The following statement is made in connection with a claim for benefits in the case of the above-named veteran/beneficiary.)

The veteran respectfully requests BVA to reconsider the decision made on July 22, 2019.
Please review attached arguments made the veteran's attorney and reconsider the decision rendered.
Thank you.

VETERAN'S SOCIAL SECURITY NO. [REDACTED]

SECTION II: REMARKS (Continued)*(The following statement is made in connection with a claim for benefits in the case of the above-named veteran/beneficiary.)***SECTION III: DECLARATION OF INTENT****I CERTIFY THAT** the statements on this form are true and correct to the best of my knowledge and belief.**9. SIGNATURE** *(Sign in ink)***10. DATE SIGNED** *(MM/DD/YYYY)*

11-20-2019

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

PRIVACY ACT INFORMATION: The VA will not disclose information collected on this form to any source other than what has been authorized under the Privacy Act of 1974 or Title 38, Code of Federal Regulations 1.576 for routine uses (i.e., civil or criminal law enforcement, congressional communications, epidemiological or research studies, the collection of money owed to the United States, litigation in which the United States is a party or has an interest, the administration of VA Programs and delivery of VA benefits, verification of identity and status, and personnel administration) as identified in the VA system of records, 58VA21/22/28, Compensation, Pension, Education, and Vocational Rehabilitation and Employment Records - VA, published in the Federal Register. Your obligation to respond is required to obtain or retain benefits. VA uses your SSN to identify your claim file. Providing your SSN will help ensure that your records are properly associated with your claim file. Giving us your SSN account information is voluntary. Refusal to provide your SSN by itself will not result in the denial of benefits. The VA will not deny an individual benefits for refusing to provide his or her SSN unless the disclosure of the SSN is required by Federal Statute of law in effect prior to January 1, 1975, and still in effect. The requested information is considered relevant and necessary to determine maximum benefits under the law. The responses you submit are considered confidential (38 U.S.C. 5701). Information submitted is subject to verification through computer matching programs with other agencies.

RESPONDENT BURDEN: We need this information to obtain evidence in support of your claim for benefits (38 U.S.C. 501(a) and (b)). Title 38, United States Code, allows us to ask for this information. We estimate that you will need an average of 15 minutes to review the instructions, find the information, and complete this form. VA cannot conduct or sponsor a collection of information unless a valid OMB control number is displayed. You are not required to respond to a collection of information if this number is not displayed. Valid OMB control numbers can be located on the OMB Internet Page at www.reginfo.gov/public/do/PRAMain. If desired, you can call 1-800-827-1000 to get information on where to send comments or suggestions about this form.

4/3 ✓

VETERANS ADVOCACY SERVICES, INC.
220 HILL RD., GROTON, MA 01450
PH: 978-448-9910
www.veteransadvocacyservices.org

"THERE IS NO GREATER PRIVILEGE THAN TO SERVE A VETERAN"
MAM

Margaret Ann Matthews, MSW
President, VA Accredited Agent

A 501(c) (3) Nonprofit Org.

July, 2016

DEPARTMENT OF VETERANS AFFAIRS
Board of Veterans' Appeals
Washington D.C. 20420

RE: MR. Lewis Harold Dusett III
[REDACTED]

Your Honor:

I, Margaret Matthews, VA Accredited Agent and Advocate for Lewis Harold Dusett, a combat veteran and American hero, submit this report in response to a Statement of the Case dated June 2, 2015 from the Regional VA office in Buffalo, New York. The Ratings Decision made on October 17, 2014 eventuated from a claim submitted by Mr. Dusett and received by the VA on October 22, 2013. Mr. Dusett served in the Marine Corps from August 18, 2008 to January 31, 2009 and again from May 1, 2010 to May 4, 2011, when he was deployed to an imminent danger zone in Afghanistan. While serving in Afghanistan, he sustained injuries to his head, neck, shoulders, back, and knees.

This submission argues that Mr. Dusett's conditions are consistent with the hardship of his service and that he should be granted service connection for all issues of disagreement articulated in the Notice of Disagreement. (EXHIBIT A).

Issues of Disagreement:

- Tinnitus (10% evaluation sought)
- Right Shoulder Condition
- Neck Condition
- Lower Back Condition
- Bilateral Knees Condition

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Margaret Ann Matthews, MSW
President, VA Accredited Agent

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FAX TRANSMITTAL COVER SHEET


DATE: 7-20-2016

TO: EVIDENCE INTAKE CENTER

FAX NUMBER: 844-531-7818

FROM: MARGARET MATTHEWS

NUMBER OF PAGES: 16

SUBJECT: Mr. Lewis H. Dwyer III
[REDACTED] Report for
Board of Veterans' Appeal
THanks


MRAP to fix an antenna. The Marine lost his footing and fell approx. twelve to fifteen feet. The Marine did in fact hit his head on the hard ground. The Marine was MEDEVAC to FOB Dwyer within a few hours. He was evaluated by the on scene Corpsman, the Company Corpsman Chief Basil, and the Regimental Aid Station. His injury was classified a level three concussion and assigned light duty for two days. He returned to full duty following this.

Mr. Dusett's account of his fall, and those of his superiors, are supported by private medical evidence. Mr. Dusett sought medical care for those injuries that he sustained in the Marine Corps. We have obtained medical records (EXHIBIT D) from Campanella Health Center in Rochester, New York, where Mr. Dusett saw chiropractor Dr. Jacob Loturco. These records indicate that Mr. Dusett received treatment for injuries and pain at the thoracic spine, cervical spine, shoulder joint, and hip joint. Most importantly, the records indicate that Mr. Dusett was in fact treated for an injury whose origination is service is well documented by his military superiors. Chiropractor Jacob Loturco provided a statement.

A narrative letter (EXHIBIT E) from Dr. Loturco, dated June 17, 2015 reads:

The above stated patient was treated under my care for the duration of 2012 through 2014 for a work related accident involving a slip trip and fall on outstretched arm. This caused Cervical Thoracic and Glenohumeral injuries which have been well documented and treated according to standard of care guidelines within New York State and the Worker's Compensation Board. If you have any other questions please feel free to reach out and contact my office.

Mr. Dusett also sustained overuse knee injuries as a result of ruck marches and foot patrols while carrying heavy equipment.

INCOMPLETE EXAMINATION

Mr. Dusett reports that he was not asked about his knee pain even though he had specifically claimed bilateral knee conditions. He also reports that he was not asked about his back condition even though he had specifically claimed lower back condition. He reports that the examiner simply tested joint range of motion for shoulders and not much else.

38 C.F.R. § 3.42 "Complete Medical Examination of Injury Cases" reads:

"The importance of complete medical examination of injury cases at the time of first medical examination by the Department of Veterans Affairs cannot be overemphasized. When possible, this should include complete neurological and psychiatric examination, and other special examinations indicated by the physical condition, in addition to the required general and orthopedic or surgical examinations. When complete examinations are not conducted covering all systems of the body affected by disease or injury, it is impossible to visualize the nature and extent of the service connected disability.

"My testimony with respect to my claim for Tinnitus; Right Shoulder Condition; Neck Condition; Lower Back Condition; and Bilateral Knees condition is consistent with the hardship of my service as outlined in 38 CFR 3.304 (d) Combat. Satisfactory lay or other evidence that an injury or disease was incurred or aggravated in combat will be accepted as sufficient proof of service-connection if the evidence is consistent with the circumstances, conditions, or hardships of such service even though there is no official record of such occurrence or aggravation."

Lewis Harold Dusett, from Notice of Disagreement dated April 7, 2015. (EXHIBIT A).

SERVICE BACKGROUND HISTORY

Mr. Dusett, a Corporal in Company C, 1st Battalion, 25th Marines was deployed in the Garmsir District of the Helmand Province in Afghanistan from August, 2010 until April, 2011. When he was overseas on a combat patrol, Mr. Dusett fell off a MATV (a Mine Resistant Ambush Protected Vehicle), from a height of approximately 15 feet. He was throwing an MRE down a turret hatch when he lost his footing fell off vehicle. He landed on his head and neck and as a result he was knocked out for approximately three minutes. Mr. Dusett sustained a serious TBI (traumatic brain injury) along with shoulder, back, neck, and knee injuries. Following his injuries, he was confined to bed rest for more than five days. This submission presents two letters from superior ranking soldiers that corroborate Mr. Dusett's account of his fall from the MATV.

A letter (EXHIBIT B) from James Pierce Lalor, Commanding Officer, Company C, 1st Battalion, 25th Marines, dated May 18, 2014 reads:

I, Captain James Lalor, am writing this letter to validate an incident for Corporal Luke Dusett. At the time of his injury I was executive Officer of India Company and in charge of the Combat Operation Center. I was aware that Cpl Dusett's section was conducting a motorized combat patrol in the Garmsir District of the Helmand Province. Cpl Dusett's section of Marines had to MEDEVAC him due to head injury after falling off a MRAP while attempting to fix an antennae. The Marine was MEDEVAC to FOB Dwyer within a few hours. He was evaluated by the on scene Corpsman, the Company Corpsman Chief Basil, and the Regimental Aid Station. His injury was classified a level three concussion and assigned light duty for two days. He returned to full duty following this. The Point of Contact in this matter is Gunnery Sergeant Matthew Drake 716-998-0185.

A letter (EXHIBIT C) from Matthew D Drake, Company Gunnery Sergeant, Company C, 1st Battalion, 25th Marines, dated May 18, 2014 reads:

I, Gunner Sergeant Matthew Drake, am writing this letter to validate an incident for Corporal Luke Dusett. At the time of his injury I was in direct supervision of Corporal Luke Dusett. Corporal Dusett's section of Marines was tasked with a motorized combat patrol in the Garmsir District of the Helmand Province. During said patrol Corporal Dusett was tasked as the gunner in a MRAP, and also instructed to go on top of the

Incomplete examination is a common cause of incorrect diagnosis, especially in the neurological and psychiatric fields, and frequently leaves the Department of Veterans Affairs in doubt as to the presence or absence of disabling conditions at the time of the examination.”

38 C.F.R. § 4.1 “Essentials of Evaluative Ratings” reads, in part:

“For the application of this schedule, accurate and fully descriptive medical examinations are required, with emphasis upon the limitation of activity imposed by the disabling condition.”

38 C.F.R. § 4.40 “Functional Loss” reads, in part:

““Disability of the musculoskeletal system is primarily the inability, due to damage or infection in parts of the system, to perform the normal working movements of the body with normal excursion, strength, speed, coordination and endurance. It is essential that the examination on which ratings are based adequately portray the anatomical damage, and the functional loss, with respect to all these elements. The functional loss may be due to absence of part, or all, of the necessary bones, joints and muscles, or associated structures, or to deformity, adhesions, defective innervation, or other pathology, or it may be due to pain, supported by adequate pathology and evidenced by the visible behavior of the claimant undertaking the motion. Weakness is as important as limitation of motion, and a part which becomes painful on use must be regarded as seriously disabled.”

Had the examiner searched diligently to ascertain the full scope of all of our claimants’ conditions, he would have ascertained that that Mr. Dusett experiences significant functional loss in employment and recreation.

Again, had the examiner searched diligently to ascertain the full scope of all of Mr. Dusett’s conditions, he would have ascertained that Mr. Dusett experiences at least four of the limitations outlined in Title 38 CFR 4.45 “The Joints” including “Less movement than normal”, “weakened movement”, “excess fatigability”, and “pain on movement”.

In consideration of the aforementioned laws, Mr. Dusett’s VA joints examination on July 3, 2014 was incomplete and thus inappropriate for the application of the disability schedule. The VA examiner entirely ignored certain parts of the body that Mr. Dusett had specifically identified in his original claim. By “ignore,” we mean that the examiner failed to inquire about, test for pain, test for ROM, or perform any other task pertaining to those body parts. Under no circumstances should an examination that does not pay any attention to multiple claimed conditions be considered appropriate and fit for application of the disability schedule.

SERVICE CONNECTION

Mr. Dusett’s claimed conditions, as outlined in the Notice of Disagreement, are all absolutely consistent with the hardships of his service. MATV’s are by no means

proofed from accidental falls or slips, and it is reasonable to imagine that a soldier falling from such a distance, while wearing heavy equipment, would suffer serious injury, including injuries to the brain, spine, and extremities. This is exactly what happened to Mr. Dusett. Following his injuries, he was confined to bed rest for more than five days.

Further, ruck marches and foot patrols have been known to cause overuse injuries to the knee joint and surrounding musculature and ligaments. The musculoskeletal demands placed on infantrymen have been well documented at this point 14 years after the invasion of Iraq. They are the leading cause of medical evacuations and medical encounters for all US military.

A myriad of other service-related duties are known to exert serious demands on the bodies musculoskeletal system. One such activity is lifting heavy sandbags repeatedly. Mr. Dusett reported that his forward operating base was in a state of disarray when he arrived and so he had to spend significant amounts of time lifting and moving sandbags. There are two main methods of picking heavy objects off the floor- deadlifting and squatting. Bending at the hip to pick up objects from the floor imposes considerable stress on the lumbar region of the spine. Squatting, or lowering ones center of gravity to pick up objects from the floor, also imposes considerable stress on both the lumbar region of the spine and the knee joint. Another service-related duty that can cause overuse degradation is repeatedly mounting and dismounting HUMVEEs while wearing heavy gear. Mr. Dusett would regularly ride HUMVEES traversing bumpy terrain. Riding around in combat vehicles while wearing heavy gear can exacerbate the affects of load bearing on the spine. Dr. Cohen of the John Hopkins University School of Medicine writes, "People will have back pain because you have to go on these long road marches and carry heavy equipment, wearing body armor...The roads are not paved. Riding in these vehicles while wearing body armor, it hurts your back".

38 C.F.R. § 3.304 (D) reads:

"Satisfactory lay or other evidence that an injury or disease was incurred or aggravated in combat will be accepted as sufficient proof of service connection if the evidence is consistent with the circumstances, conditions or hardships of such service even though there is no official record of such incurrence or aggravation."

A sound application of this law to Mr. Dusett's circumstances should indicate that his various disabilities do warrant service connection. If there is any doubt at all as to the origins of Mr. Dusett's afflictions, Title 38 CFR 3.102 provides instruction for resolution of the matter:

"It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant... The reasonable doubt doctrine is also applicable even in the absence of official records, particularly if the basic

incident allegedly arose under combat, or similarly strenuous conditions, and is consistent with the probable results of such known hardships.”

RESULTANT EFFECT ON FUNCTIONALITY

As a result of his service-connected disabilities, Mr. Dusett faces numerous obstacles to leading a normal and productive life. Mr. Dusett works a full-time office job that requires him to sit at his desk and use his computer for at least 8 hours a day. Mr. Dusett is in fact more comfortable in a standing position (despite the fact that he experiences knee pain in a standing position) because sitting exerts more strain on his back condition. He put in a request at his work to move to a standing desk, but he is still waiting for accommodations. Presently, Mr. Dusett's conditions are a frustrating impediment towards happiness and productivity in the workplace.

Mr. Dusett's service-connected disabilities also prevent him from engaging in the type of recreational activity that men in their 20's typically enjoy. Mr. Dusett remarked to me that before his military service, he could deadlift well over 400 pounds and squat heavy weights in the gym. Now, his back pain prevents him from performing these exercises at all, to say nothing of loading heavy weights.

Mr. Dusett's frustration of having sustained serious injuries while in service is compounded by the fact that his sacrifices have yet to be recognized and legitimized by this administration. The VA has a responsibility to validate valor and help heal the wounds of this nation's warriors. We strongly believe that responsibility entails granting service connection to Harold Dusett III.

Respectfully submitted,


Margaret Ann Matthews