BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
ROBERT S. BARR
Represented by
Cinthia Johnson, Attorney

SS [redacted]
Docket No. 12-24 253

DATE: December 10, 2019

ORDER

Entitlement to service connection for substance abuse disorder secondary to the service-connected major depressive disorder is granted.

FINDING OF FACT

The Veteran's substance abuse disorder is proximately due to/aggravated beyond its natural progression by his service-connected major depressive disorder.

CONCLUSION OF LAW

The criteria for service connection for substance abuse disorder as secondary to the service-connected major depressive disorder are met. 38 U.S.C. §§ 1110, 5107; 38 C.F.R. §§ 3.102, 3.310.

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran had active service from December 1992 to February 1993.

This matter originally came before the Board of Veterans' Appeals (Board) on appeal from a September 2012 rating decisions by the Department of Veterans Affairs (VA) Regional Office (RO) in Hartford, Connecticut.

In April 2015, the Board requested a Veterans' Health Administration (VHA) advisory opinion (VHA opinion) with regard to the Veteran's claim for service connection for substance abuse as secondary to his service-connected depression. *See* 38 U.S.C. § 7109; 38 C.F.R. § 20.901(a). The resulting VHA opinion was received by the Board in May 2015 and sent to the Veteran in August 2015.

The Board adjudicated this appeal in a July 2016 decision. The Veteran appealed the Board's denial of entitlement to service connection for substance abuse, as secondary to his service-connected depression to the Court. In February 2017 the Court granted a joint motion for partial remand (JMPR) of the Veteran and the Secretary of Veterans Affairs, vacated the July 2016 Board decision insofar as it denied entitlement to service connection for substance abuse, as secondary to his service-connected depression, and remanded the case to the Board for action consistent with the terms of the JPMR.

The JMPR found that the Board did not adequately discuss the language of the pertinent regulation, 38 C.F.R. § 3.310(b) which states that any increase in severity of a nonservice-connected disease or injury that is proximately due to or the result of a service-connected disease or injury, and not due to the natural progress of the nonservice-connected disease, will be service connected. The JMPR also found that the Board did not adequately explain its bases for favoring a May 2015 VA opinion over a May 2016 private opinion because the Board failed to reconcile the findings of each opinion prior to favoring the May 2015 VA opinion.

In July 2017, the Board requested another VHA opinion with regard to the Veteran's claim for service connection for substance abuse as secondary to his service-connected depression. *See* 38 U.S.C. § 7109; 38 C.F.R. § 20.901(a). The resulting VHA opinion was received by the Board in August 2017 and sent to the Veteran that same month.

The Board once again adjudicated the Veteran's appeal in a January 2018 decision. The Veteran appealed the Board's denial of entitlement to service connection for substance abuse, as secondary to his service-connected depression, to the Court.

In a June 2019 Memorandum Decision, the Court set aside the Board's January 2018 decision after finding that the Board failed to provide an adequate statement of reasons and bases for the denial. The Court also found that the Board failed to address whether the Veteran's substance abuse increased after service, a question that was also recognized by the Court in its February 2017 remand order. The Court remanded the matter for further proceedings consistent with the opinion.

The matter is back before the Board for further proceedings consistent with the Court's June 2019 Memorandum Decision.

Service Connection

Generally, service connection will be granted for a disability resulting from an injury or disease caused or aggravated by service. 38 U.S.C. §§ 1110. A grant of service connection for a disability requires: (1) a present disability or persistent or recurrent symptoms of a disability; (2) an in-service incurrence of aggravation of a disease or injury; and (3) a causal relationship ("nexus") between the present disability and the in-service event, injury, or disease. 38 C.F.R. § 3.303; *see Walker v. Shinseki*, 708 F.3d 1331 (Fed. Cir. 2013).

In order to prevail under a theory of secondary service connection, there must be: (1) evidence of a current disorder; (2) evidence of a service-connected disability; and, (3) medical nexus evidence establishing a connection between the service-connected disability and the current disorder. *See Wallin v. West*, 11 Vet. App. 509, 512 (1998).

In addition, the regulations provide that service connection is warranted for a disorder that is aggravated by, proximately due to, or the result of a service-connected disease or injury. 38 C.F.R. § 3.310. Any additional impairment of earning capacity resulting from an already service-connected disability, regardless of whether or not the additional impairment is itself a separate disease or injury caused by the service-connected disability, should also be compensated. *Allen v.*

Brown, 7 Vet. App. 439 (1995). When service connection is thus established for a secondary disorder, the secondary disorder shall be considered a part of the original disability.

The Board must consider the competency, credibility, and weight of all evidence, including the medical evidence, to determine its probative value. The Board must then account for evidence that it finds persuasive or unpersuasive, and provide reasons for rejecting any evidence favorable to the claimant. *Timberlake v. Gober*, 14 Vet. App. 122, 129 (2000) ("Our case law requires only that the Board address its reasons for rejecting evidence that is favorable to the veteran."). Equal weight is not accorded to each piece of evidence contained in the records and every item of evidence does not have the same probative value. If the evidence weighs in favor of the Veteran or is in relative equipoise, the Veteran will prevail. On the other hand, if the preponderance of the evidence is against the Veteran the claim is denied. *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990).

1. Entitlement to service connection for substance abuse disorder secondary to major depressive disorder

The Veteran contends that secondary service connection is warranted for substance abuse disorder secondary to major depressive disorder. A review of the record shows that the Veteran has a current diagnosis for major depressive disorder.

Considering the procedural history and as noted in the introduction, in a June 2019 Memorandum Decision, the Court found that the Board failed to provide an adequate statement of reasons or bases in denying the Veteran's January 2018 appeal before the Board. The Board's decision stated that it found that the Veteran's depression and substance abuse were unrelated, based on a 2017 VA medical examination. However, the decision did not discuss a private medical opinion submitted by the Veteran in late 2017 that specifically addressed and rejected the 2017 VA examiner's reasoning and concluded that, "in Mr. Barr's case, more likely than not, his major depression and substance abuse have been interacting with each other for many years." The Board did not address this relevant and favorable evidence or explain its reasons for rejecting it.

The Court also found that the Board erroneously failed to address whether the Veteran's substance abuse increased after service. This question was raised by the Veteran, who asserted that his substance abuse worsened whenever he became depressed after service. The question was also recognized by the Court in its February 2017 remand order, which directed the Board to" reevaluate the medical evidence with the standard for demonstrating aggravation of a non-service-connected disability." However, the Board failed to address whether the Veteran's substance abuse increased after service, after noting that such a finding "would only demonstrate that military service directly increased the Veteran's substance abuse disorder, and a substance abuse disorder. . . can only be established if it is secondary to an already service-connected disability." The Court observed that the Veteran's contention that his substance abuse was made worse by his service-connected depression. The Court highlighted the fact that, as the Veteran's service-connected major depression became manifest during or after service, the question whether the Veteran's substance abuse had increased after service was relevant to the issue of secondary service connection and the Board's failure to address this issue, or adequately explain its decision not to address it, rendered its statement of reasons or bases inadequate. *See Robinson*, 21Vet. App. at 552; *Allday*, 7 Vet. App. at 527.

The Court remanded the appeal herein back to the Board to provide an adequate statement of reasons or bases and address the favorable evidence in the first instance. *See Tucker v. West*, 11 Vet. App. 369, 374 (1998) (remand is appropriate where the Board has failed to provide an adequate statement of reasons or bases); *see also Hensley v. West*, 212 F.3d 1255, 1263-64 (Fed. Cir. 2000). Furthermore, the Court found that the Veteran's argument that the Board failed to accord him the benefit of the doubt pursuant to 38 U.S.C. § 5107(b) was inextricably intertwined with the remanded matter. *See Gurley v. Nicholson*, 20 Vet. App. 573, 575 (2007).

The Veteran's record contains several medical opinions, offering differing conclusions as to whether the Veteran's substance abuse was proximately due to, resulted from, or aggravated by his service-connected major depression. The opinions are comprised of psychological and medical examinations, including three lay statements provided by the Veteran in October 2019 from his childhood

friends regarding their observations about worsening of the Veteran's substance abuse disorder after discharge from service.

In a March 2005 VA examination, the examiner, while acknowledging that the Veteran's depression existed prior to service, noted that the significant rejection experienced by the Veteran because of his early military discharge may have influenced his relapse. During a September 2005 private examination by a psychologist, Dr. DRJ opined that the Veteran had been depressed since discharge and post-service use of alcohol was a means of self-medicating. An October 2005 private opinion, Dr. DRJ noted the Veteran's long history of substance abuse treatment approximately one year after discharge from service.

Another private opinion submitted by the Veteran in October 2015 from Dr. DRJ showed that the Veteran's service-connected major depressive disorder aggravated his substance abuse disorder. Dr. DRJ issued the opinion after reviewing treatment records for periodic substance abuse relapses. In March 2016 Dr. DRJ confirmed his previous findings once again during a follow up examination with the Veteran.

A VA examination in mid-April 2016 found that the Veteran had several relapses in the past three years that seemed to last about a month long at a time before achieving sobriety for a short time.

A May 2016 private opinion from Dr. BV, a colleague of Dr. DRJ considered the examinations conducted prior to the May 2016 examination and noted that the Veteran's pre-existing substance abuse problem was permanently worsened or aggravated after service, beyond what would be considered the natural progression of the condition. Dr. DRJ cited several studies which support that depressed individuals are more prone to addiction and the use of alcohol to self-medicate compared to others.

In October 2017, Dr. DRJ issued another opinion after reviewing the findings of an August 2017 VHA advisory opinion and found that the opinion was based on a lack of adequate review of the record as the Veteran's VA treatment record showed periods of worsening of his condition when he relapsed and concluded that the Veteran's substance abuse disorder was aggravated by his service-connected major depressive disorder.

Post-Remand by the Court, in July 2019 private opinion, the Dr. DRJ once again reiterated that the Veteran's substance abuse was aggravated as a result of his major depressive disorder and pointed to his own previous reports from March 2016 and October 2017 for the rationale provided regarding aggravation.

In October 2019, Dr. BV, issued an opinion citing the same studies previously cited by Dr. DRJ and noting that based on the clinical research and studies, the findings on the April 2016 VA examination that the Veteran's substance abuse was considered a natural progression of the condition was a clinical error. He opined that the Veteran's substance use disorder of alcohol use and cocaine use is at least as likely as not incurred in or caused by service-connected depression and back injury.

On the other hand, several VA medical examinations included opinions and statements that weighed against the Veteran's claim for service connection as secondary to his major depression:

A VA examination conducted in April 2011 noted that the Veteran had extensive substance abuse problems prior to entry onto active duty in 1992. The report indicates that he was using cocaine from age 20 to 30. An August 2012 VA medical examination also found that the Veteran's substance abuse disorder pre-existed service and was not aggravated either during service, or after service by his service-connected depression. A January 2013 VA examination noted that the Veteran continued to be depressed, although he had been sober since 2012.

A May 2015 VA advisory opinion concluded that the Veteran's depression and substance abuse were separate diagnostic entities with different courses over time and because they are separate, medical literature does not support that the Veteran's major depressive disorder could cause a permanent increase in his substance use disorder.

The Veteran was afforded an early April 2016 VA examination to review conflicting medical evidence, including an April 2011 VA examination, an August 2012 VA examination, a January 2013 VA examination referenced below, and the October 2015 private opinion referenced above. The examiner, after reviewing the Veteran's history of having a substance abuse problem prior to service and after

reviewing the aforementioned conflicting examinations, opined that the Veteran's substance use was less likely than not aggravated beyond its natural progression by his military service or service-connected depression. She found that problematic substance use clearly and unmistakably pre-dated military service and severity did not increase after military service.

In July 2017, the Board requested a VA advisory opinion, which was provided in August 2017. The August 2017 opinion noted that the Veteran's substance abuse predated his military service and therefore could not have caused by his service-connected disabilities. The examiner reviewed previously issued opinions of record to find that the Veteran's substance abuse was less likely connected or aggravated by his major depressive disorder.

A review of the record post-service shows that the Veteran separated from the military after receiving a medical discharge in 1993. Soon thereafter, he became depressed and turned to drugs and alcohol. From 1999 to 2011, the Veteran remained sober. However, VA treatment records from 2012 show that the Veteran had a relapse and began using alcohol and cocaine once again with periods of sobriety and relapses over the next several years in 2013, 2014 and 2016.

In assessing the competency and credibility of the various VA and private opinions of record discussed above, the Board observes inconsistencies in the VA examinations were some examinations noted overlapping symptoms between the Veteran's major depression, while others found the substance abuse to be a separate condition. Considering the consistency of the private opinions provided by Dr. DRJ and BV, the Board gives more weight to the private opinions as they focus on the impact of the Veteran's major depression on his substance abuse disorder, supported by a detailed consistent rationale throughout the period of appeal, along with scientific studies to support their conclusion that the Veteran's substance abuse was aggravated beyond natural progression due to his major depression, post-service. *See* 38 C.F.R. § 3.310(b).

In *Gilbert, supra*, the Court stated that "a veteran need only demonstrate that there is an 'approximate balance of positive and negative evidence' in order to prevail." To deny a claim on its merits, the preponderance of the evidence must be against the claim. *See Alemany v. Brown*, 9 Vet. App. 518, 519 (1996) (citing Gilbert, 1

Vet. App. at 54). Here, the Board finds that the evidence is, at a minimum, at least in equipoise and therefore reasonable doubt shall be resolved in the Veteran's favor. Entitlement to service connection for substance abuse secondary to major depressive disorder is granted.

KRISTI L. GUNN
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board S. Khan, 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.

Department of Veterans Affairs

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, 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).