



BOARD OF VETERANS' APPEALS
FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
BARRY E. MORRIS

Represented by
Disabled American Veterans

[REDACTED]
Docket No. 10-10 850

DATE: September 17, 2019

ORDER

Service connection for an acquired mental health condition is denied.

FINDING OF FACT

The preponderance of the evidence is against finding that the Veteran's acquired mental health condition is causally related to his military service.

CONCLUSION OF LAW

The criteria for service connection for an acquired mental health have not been met. 38 U.S.C. §§ 1110, 5107; 38 C.F.R. §§ 3.102, 3.303, 3.304.

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran served in the Air Force from November 1980 to November 1987. This matter is before the Board of Veterans Appeals (Board) on appeal from a September 2009 decision of the Waco, Texas Department of Veterans Affairs (VA) Regional Office (RO). This matter was previously remanded by the Board for additional development on October 2013.

Service connection for an acquired mental health disorder is denied.

Legal Criteria

Service connection may be granted for a disability due to a disease or injury incurred in or aggravated by active military service. 38 U.S.C. § 1131; 38 C.F.R. §§ 3.303, 3.304. To establish service connection there must be evidence of: (1) a present disability; (2) incurrence or aggravation of a disease or injury in service; and (3) a causal relationship between the first two elements. *Shedden v. Principi*, 381 F.3d 1163, 1166-67 (Fed. Cir. 2004).

Factual Background

The Veteran has a current diagnosis of an acquired mental health disorder. See March 2005 medical treatment.

Regarding an in-service stressor, the Veteran stated that, while he was stationed in Saudi Arabia, he had to pick up body parts of Americans who were killed after airplane crashes in Saudi Arabia and put them into body bags. He stated he had to do this no less than 30 times over the course of a 3 month stay. See July 2016 Veteran Statement.

Given that the Veteran's military occupation was as a food service specialist, the Board requested the Joint Services Records Research Center (JSRRC) undertake appropriate development to verify the accuracy of the Veteran's statement. Mr. Barry Spink of the Air Force Historical Research Agency provided a statement where he confirmed that cooks were tasked with recovering human remains from an aircraft crash site. However, he noted that there were no aircraft crashes at the Elf-1 command in Saudi Arabia during the period the Veteran was stationed there. Mr. Spink also reviewed the Elf-1 history, as well as that of the main supporting flying units and found no basis of fact for any need to render assistance to recover human remains. He further noted there were no ground deaths reported and that he did not remember anything like what the Veteran was claiming, despite being stationed there during the same period. See Spink Statement.

At a March 2018 VA examination, the examiner noted the Veteran's report that he had to pick up body parts of Americans who were killed after airplane crashes in Saudi Arabia was adequate to support a diagnosis of post-traumatic stress disorder (PTSD.) See March 2018 VA examination. The Veteran also reported at the March 2018 VA examination that an additional stressor was that people treated him poorly when he was in the military. The VA examiner found that this stressor did not meet criterion A to support a diagnosis of PTSD nor was it related to a fear of hostile military or terrorist activity.

On a February 2019 VA medical questionnaire, the physician opined that the Veteran's acquired psychiatric condition was less likely than not incurred in or caused by the claimed in-service injury, event, or illness. As a rationale, the physician noted that the Veteran denied psychiatric symptoms at an October 1987 medical examination. The physician referred to a May 2009 medical examination wherein the Veteran reported the onset of depressed mood in childhood, with an exacerbation of symptoms in 2008 (twenty-one years after service) after his girlfriend lost her job. Finally, the physician cited a June 2009 medical examination which showed a history of depression and anxiety in the context of 8 years of sobriety from marijuana, alcohol and cocaine. See 2009 VA treatment records.

The physician also noted that the stressors the Veteran reported at the March 2018 VA examination were different than the stressor he previously reported in an October 2004 correspondence (at which time he claimed that his in-service stressor was being given jobs he was not qualified to do while he was stationed in Anchorage, Alaska).

The physician took note of the fact that the JSRRC was unable to confirm the asserted stressors and opined that service connection could not be granted based on fear-easing standards because the record did not indicate any combat encounters and that the claimed traumatic events were not consistent with the evidence of record.

Analysis

The Board is required to evaluate supporting evidence, including all pertinent medical and lay evidence. 38 U.S.C. § 1154(a). The Board has assessed the credibility and weight of all the evidence to determine its probative value, accounting for the evidence which it finds persuasive or unpersuasive, and providing the reasons for rejecting any evidence favorable to the claimant. *Masors v. Derwinski*, 2 Vet. App. 181 (1992).

After reviewing the evidence of record, the Board finds that the preponderance of the evidence is against finding that the Veteran's acquired mental health disorder is causally related to his service.

The Veteran's statement about retrieving human body parts on at least 30 occasions during a three-month tour of duty in Saudi Arabia is inconsistent with the JSRRC investigation and statement provided by the Air Force Historical Research Agency. This inconsistency, along with the Veteran's changing and inconsistent statements about in-service stressors and the inconsistencies in identifying when the condition began, compel the Board to find that the Veteran's statements about retrieving human body parts, along with his other claimed stressors, are not credible. *See Caluza v. Brown*, 7 Vet. App. 498, 510-11 (1995) (Board must evaluate credibility of all evidence; lay statements may be evaluated based on, inter alia, inconsistent statements, facial plausibility, and consistency with other evidence of record). To be clear, the Board is not questioning the Veteran's honesty or moral character. The Veteran is attempting to recollect events that occurred during a stressful period of his life and the Board is forced to conclude that the Veteran is not an accurate historian as to these particular statements. *See Caluza*, 7 Vet. App. at 510-11. Therefore, the Board cannot assign them significant probative weight. *Id.*

Although the March 2018 VA examiner opined that the claimed stressor of having to pick up body parts after a plane crash was adequate to support a diagnosis of PTSD, the examiner did not address the JSRRC's finding that there were no reports of any aircraft crashes or ground deaths during the period the Veteran served at the Elf-1 command in Saudi Arabia. As such, the Board cannot assign this opinion probative weight because it is not based on an accurate factual premise.

The Board assigns significant probative weight to the February 2019 VA physician's negative nexus opinion which was rendered after a thorough review of the Veteran's medical records and which considered the JSRRC finding. The February 2019 opinion also noted the inconsistencies in the Veteran's statements regarding his acquired mental health disorder such as the discrepancies in reported in-service stressors and when the condition began.

As a result, the Board finds that an in-service injury or disability has not been established and that service connection for an acquired mental disorder must be denied.



VICTORIA MOSHIASHWILI
Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board

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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.cave.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).