

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

ROGER N. YOUNG,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 19-8529
)	
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

APPELLEE'S MOTION TO DISMISS

Pursuant to United States Court of Appeals for Veterans Claims Rule 27(a), Appellee Robert L. Wilkie, Secretary of Veterans Affairs, respectfully moves the Court to dismiss this appeal on jurisdictional grounds. This motion raises an issue concerning the Court's subject matter jurisdiction over this appeal.

On December 9, 2019, Appellant filed a Notice of Appeal (NOA) for the Board of Veterans' Appeals (BVA or Board) decision of an October 3, 2019. However, prior to filing his NOA, on November 14, 2020, the Board received a motion for reconsideration from Appellant of the Board decision. See Attachment. This request is still pending. See *id.*

A copy of the BVA decision was transmitted to the Court on January 9, 2020, pursuant to U.S. Vet. App. R. 4(c).

A BVA decision is not subject to judicial review while a motion for reconsideration filed by the appellant is pending. *Rosler v. Derwinski*, 1 Vet.App.

241, 249 (1991) (motion for reconsideration filed during 120-day judicial appeal period after BVA decision abates finality of BVA decision); *Mayer v. Brown*, 37 F.3d 618, 619 (Fed. Cir. 1994) ("CVA has jurisdiction only when the appellant files a timely appeal from a *final* decision of the Board") (emphasis added); see also *Losh v. Brown*, 6 Vet.App. 87, 90 (1993) (simultaneous filing of motion for reconsideration and NOA renders BVA decision nonfinal, and jurisdiction remains with BVA). As the Court unequivocally stated in *Brienza v. Derwinski*, 2 Vet.App. 584, 585 (1992), "when there is a motion for reconsideration filed within the 120-day judicial appeal period . . . the original BVA decision [is] rendered a nullity [and] the subsequently filed NOA of that decision [is] also a nullity and the appeal must be dismissed."

The law is clear that the Court must decline jurisdiction over a BVA decision which is not final because a request for reconsideration is pending. The Court has deviated from that principle on one occasion, holding, in *Wachter v. Brown*, 7 Vet.App. 396 (1995) (per curiam), that a premature NOA was merely ineffective, but became effective upon the Chairman's denial of the motion for BVA reconsideration. The instant case is easily distinguishable from *Wachter*: Here, Appellant's motion for reconsideration has not been denied.

In *Pulac v. Brown*, 10 Vet.App. 11 (1997) (per curiam) the Court wrote:

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. . . . *Given that there is no final BVA*

decision in this matter, there is no appeal before the Court over which it could exercise its jurisdiction. (emphasis added).

Id. The Court further held in *Pulac* that it even lacks jurisdiction to act upon a motion filed on behalf of the appellant in such litigation. *Id.*

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

Appellant is unopposed to this motion.

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/Kenneth A. Walsh
KENNETH A. WALSH
Deputy Chief Counsel

/s/Bobbiretta E. Jordan
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ATTACHMENT

ROGER N. YOUNG - [REDACTED]

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November 8, 2019

Litigation Support Branch
Board of Veterans' Appeals
P.O. Box 27063
Washington, DC 20038

RE: Motion for Reconsideration, SS No. [REDACTED]

Dear Sirs,

This letter is to ask for reconsideration for my low back disability rating and compensation.

Attached you will find my most recent orthopedic report pertaining to my back dated October 21, 2019.

My orthopedic surgeon / doctor has submitted evidence pertaining to severity of my lumbar injuries.

We have been going back and forth on this issue for a couple of years now.

The facts are:

1. While in Vietnam in 1966 it is documented that I injured my back.
 - a. I was a heavy equipment mechanic.
 - b. It is noted in my military records on May 2, 1966.
 - c. It is documented that this injury has been recognized through my medical military records.

ROGER N. YOUNG - [REDACTED]

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2. In 2009 I had a partial nephrectomy performed by the VA in East Orange on my left kidney.
 - a. It has been recognized, documented and awarded compensation based under a 38 U.S.C.S 1151 ruling.
 - b. As a heavy equipment mechanic, I have not been able to work since the surgery. I had to shut down my business which had been for 50 years,

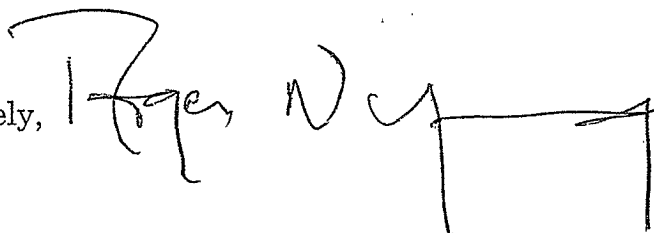
I am specifically asking for consideration for my disability back ruling and compensation based on the fact that;

- a. I returned home as a veteran with an injured back and other ailments.
- b. My back injury was worsened by the surgery performed in 2009 at the East Orange VA Hospital. The chronic and severe back pain has caused me to close my business of 50 years and lose the ability to become employable, due to the fact that any length of time on my feet, sitting in a chair, laying down or walking has always caused considerable pain.

The argument is the degree of the disability, not the denial of the disability.

I have been asked to provide proof for a nexus point and I have, it is documented in my military medical records.

Sincerely,



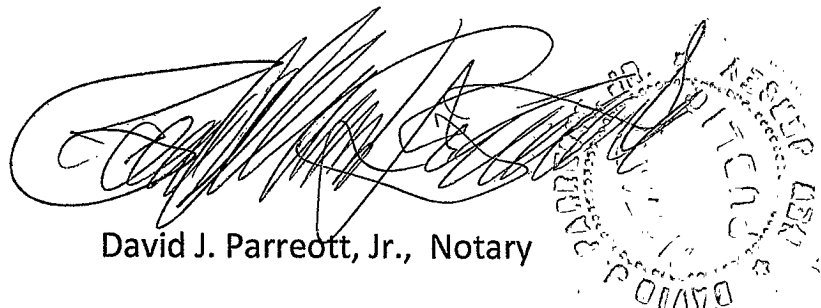
On this date 11-08-2019 Roger N. Young did appear before me

David J. Parreott, Jr.

State of New Jersey

County of Monmouth

My Commission expires 02-20-2022



David J. Parreott, Jr., Notary



CERTIFIED MAIL



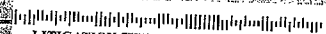
7019 0700 0001 6553 8615



AMOUNT

\$7.75
R2304W121065-0

TO



LITIGATION SUPPORT BRANCH
BOARD OF VETERANS APPEALS
P.O. BOX 27063
WASHINGTON, DC 20038

Bubble Mailer
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